ADMINISTRATIVE PROCEDURE

HEARINGS

BEFORE A

SUBCOMMITTEE OF THE COMMITTEE ON THE JUDICIARY UNITED STATES SENATE

SEVENTY-SEVENTH CONGRESS

FIRST SESSION

ON

S. 674

A BILL TO PRESCRIBE FAIR STANDARDS OF DUTY AND PROCEDURE OF ADMINISTRATIVE OFFICERS AND AGENCIES, TO ESTABLISH AN ADMINISTRATIVE CODE, AND FOR OTHER PURPOSES

S. 675

A BILL TO REVISE THE ADMINISTRATIVE PROCEDURE OF FEDERAL AGENCIES; TO ESTABLISH THE OFFICE OF FEDERAL ADMINISTRATIVE PROCEDURE; TO PROVIDE FOR HEARING COMMISSIONERS; TO AUTHORIZE DECLARATORY RULINGS BY ADMINISTRATIVE AGENCIES; AND FOR OTHER PURPOSES

AND

S. 918

A BILL TO PROVIDE FOR THE MORE ECONOMICAL, EXPEDITIOUS, AND JUST SETTLEMENT OF DISPUTE WITH THE UNITED STATES, AND FOR OTHER PURPOSES

PART 4

APPENDIX

Printed for the use of the Committee on the Judiciary

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SUBCOMMITTEE ON S. 674, S. 675, AND S. 918

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APPENDIX

STATEMENT OF THE MANNER IN WHICH S. 675, S. 674, AND S. 918, RESPECTIVELY, WOULD AFFECT THE WORK OF THE DEPARTMENT OF AGRICULTURE

(This statement was filed with the subcommittee by Mr. Ashley Sellers, of the Office of the Solicitor, Department of Agriculture, and should be considered in connection with his testimony, pp. 69 to 130, pt. 1)

The following is a statement of the manner in which each of the three bills, S. 674, S. 675, and S. 918, would affect the work of the Department of Agriculture. In the main, this statement does not attempt to appraise the effect of either of these bills upon the activities of other agencies of the Government or the administrative process in general.

If all three of these bills dealt with the same details of administrative procedure, perhaps it would be feasible to discuss them together. Even so, some difficulty would be encountered because the bills do not follow a uniform arrangement or employ the same basic terminology. In this connection, we have prepared for the use of the committee a chart showing, in comprehensive form, the variations in subject matter and language which exist in these three bills. In this chart, we have, in many instances, paraphrased the language of certain of the provisions of the bills and have set forth the exact text only where the differences in terminology appear to be significant.

In the interests of brevity and, we think clarity, we will endeavor to indicate only those particular features or provisions of S. 675 and S. 674 to which we deem it necessary to take exception or to invite attention. In most instances, following each exception or comment, we have made a suggestion for amendment in order to remove the difficulty observed. For reasons which appear in the discussion of S. 918, we have not attempted to suggest the manner in which that bill might be amended so as to render it workable.

STATEMENT AS TO S. 675

COMMENT NO. 1

Section 103 (a) of S. 675 reads, in part, that: "* * * every agency or agency tribunal is authorized to delegate to its responsible members, officers, employees, committees, or administrative boards power to manage its internal affairs; to dispose informally of requests, complaints, applications, and cases; * * *." This provision was clearly designed to facilitate delegation of the functions enumerated therein. It contemplates that, with respect both to agencies in which the ultimate authority is vested in a single individual, and to those in which such authority is vested in more than one individual, delegation of the functions enumerated shall be made to persons subordinate in rank to the person or persons constituting the ultimate authority of the respective agencies. With reference to the Commodity Exchange Commission, however, which is composed of the Secretary of Agriculture, as Chairman, the Attorney General, and the Secretary of Commerce, the provision quoted above would not accomplish its intended result. The Commodity Exchange Commission has no employees and receives no appropriation. While, for the most part, the Commodity Exchange Administration handles the administration of the Commodity Exchange Act, it is an agency of the Department of Agriculture and not of the Commodity Exchange Commission. As a consequence, the Commission would not be authorized, under section 103 (a), to delegate its powers to the same extent as would other agencies.

SUGGESTION

Amend section 103 (a) of S. 675 by adding the following sentence after the period in line 18, page 4: "For the purpose of this subsection, the personnel of the Department of Agriculture shall be regarded as the personnel of the Commodity Exchange Commission."

COMMENT NO. 2

Section 105 (2) provides that the Office of Federal Administrative Procedure shall be composed of "the Director, a justice of the United States Court of Appeals for the District of Columbia * * *, and the Director of the Administrative Office of the United States Courts, *who shall serve without extra compensation.*" It is not clear to whom the italicized clause refers, whether to all three of the officials named, to the last two, or only to the last one. Obviously, it was intended to apply to the last two.

SUGGESTION

Amend section 105 (2) by striking out the comma in line 18, page 5, and the succeeding clause "who shall serve without extra compensation" in lines 18 and 19; and by adding the following new sentence: "The justice of the United States Court of Appeals and the Director of the Administrative Office of the United States Courts shall serve without extra compensation."

COMMENT NO. 3

Although its requirements may be desirable, effectuation of the provisions of title II of S. 675 would be expensive.

Subsection (1) of section 201 would require more detailed statements of internal organization than are now made available.

Subsection (2), requiring all general policies and interpretations of law to be published, would require the publication of many additional matters, particularly under the statutes providing for administrative adjudication. For example, in the administration of the Packers and Stockyards Act, some policies have been established through decisions in adjudicative proceedings. Subsection (2) would require an analysis of all the decisions made under the statute and the translation into rules of the general policies so established. This subsection also would require the promulgation of new rules containing the substance of each opinion of the Solicitor of the Department which is accepted and acted upon in the administration of the statute.

In short, while this Department appreciates the need for the provisions rules of practice to make them more specific and comprehensive and the promulgation of rules of procedure for informal proceedings, as these are not now published.

In short, while this Department appreciates the need for the provisions of title II of S. 675, it recognizes, at the same time, that the administration of these provisions would be expensive and feels compelled to advise the Congress accordingly.

COMMENT NO. 4

Section 203 provides that the effectiveness of all regulations shall be deferred until 45 days after their publication in the Federal Register, except that the 45-day period may be curtailed upon certification of an emergency.

It is realized that, if any considerable measure of uniformity in administrative procedure is to be obtained as a result of legislation such as is proposed in S. 675, a certain degree of unnecessary standardization will be compelled. Our major concern, however, is lest, in its effort toward procedural uniformity, such legislation in general, and, at present, this bill in particular, does not set procedure before substance and, in specific instances, prevent adequate effectuation of certain of the agricultural programs contemplated by the Congress. We have made a painstaking effort to appraise the effect of section 203 upon the various activities of the Department. We find that in at least one instance, the operation of section 203, as we construe its provisions, would obstruct administration as intended by the Congress.

Under the Agricultural Marketing Agreement Act of 1937, the Secretary, after notice and hearing, as required by the said act, enters into marketing

agreements with, and issues marketing orders applicable to, handlers of certain agricultural commodities. Such agreements and orders provide (1) methods for the limitation of the total quantity of the commodity, or of any grade or size thereof, which may be marketed; (2) methods for allotting the quantity among handlers; (3) methods for disposing of surpluses; and (4) with respect solely to milk, for fixing minimum prices to be paid to producers.

In the administration of these marketing agreements and orders, and upon the basis of the recommendations made by the industry committees, which are established under the act and the marketing agreements and orders as agencies to administer such programs, the Secretary issues various types of supplemental orders, including weekly volume regulations and the allotments of handlers thereunder; grade and size regulations; regulations applicable to daily shipments; and loading and shipping prohibitions. Some of these supplemental orders are effective only for a few days or a week, and it is frequently necessary, because of a changed market situation, to amend or to terminate such an order prior to its date of termination. In order that these regulations may be effective, they must be issued very promptly, frequently within a few hours after receipt of the industry's recommendation, which is predicated upon daily market data. In such cases, there is not even time for the publication of such orders in the Federal Register prior to their effective date. Actual notice, rather than constructive notice, is relied upon. Publication in the Federal Register will not bring such regulations to the attention of handlers of agricultural commodities who are subject to such orders. Only through other means can such regulations actually be brought to their attention. Provisions for notice of such regulations, to be given by the industry committee, are prescribed in all marketing agreements and orders, and such notices are frequently mailed to the handlers. With a rapidly changing market situation, any such regulation, to achieve a desired result, must be operative very promptly.

Undoubtedly, these supplemental orders or regulations are "rules" within the meaning of title II of S. 675 and would be subject to the provisions thereof. Under section 203 of S. 675, publication of these regulations in the Federal Register would be necessary before action could be taken thereon, necessitating at least a 2-day delay in their issuance, which would be disastrous to the successful operation of programs under the Agricultural Marketing Agreement Act of 1937.

SUGGESTION

Amend section 203 of S. 675 by substituting a colon for the period in line 6 on page 10, and adding the following: "*Provided, however*, That this section shall not be applicable to rules issued within the contemplation of the provisions of any marketing agreement or marketing order entered into or issued pursuant to and after the hearing required by Public Act No. 10, Seventy-third Congress, as amended, and as reenacted and amended by the Agricultural Marketing Agreement Act of 1937, as amended (7 U. S. C., sec. 601 et seq)."

COMMENT NO. 5

The provisions of title II of S. 675 are applicable alike to each agency embraced within the definition of the term "agency" in section 102 (a). That is to say, title II of S. 675 does not, as does title II of S. 674, expressly except from its operations the rule-making activities or functions of any agency, as so defined. Section 201 of S. 674 expressly exempts from title II of that bill the performance of national-defense functions and the conduct of foreign affairs. In order to take every possible precaution that such vital activities shall not be subjected to any of the provisions of legislation such as is here proposed, and inasmuch as several of the agencies of the Department of Agriculture have been designated as national-defense agencies, it is suggested that an additional section be inserted in title II of S. 675 similar to section 201 of S. 674.

Furthermore, it appears doubtful that the draftsmen of either S. 674 or S. 675 intended their respective bills to be applicable to administration of the several small claims acts, under which this Department and other Government agencies adjust certain claims for damages to property and for personal injuries, arising out of the negligence of Government employees or out of casualties occurring in Government operations. Accordingly, it is suggested that title II of S. 675 expressly except such matters from its operations.

SUGGESTION

Amend title II of S. 675 by adding the following new section at the bottom of page 10:

"SEC. 207. *Exceptions.*—The provisions of this title shall not apply to—

"(a) the conduct of military, naval, or national-defense functions, or the selection or procurement of men or materials for the armed forces of the United States; or

"(b) the conduct of diplomatic functions, foreign affairs, or activities beyond the territorial limits of the United States affecting the relation of the United States to other nations; or

"(c) the administration of special statutory provisions relating to settlement of claims arising out of the negligence of Government employees or for damages to private property resulting from casualties occuring in Government operations."

COMMENT NO. 6

Despite the studious effort made by the draftsmen of S. 675 to exempt from the operations of title III of the bill all functions and activities to which the procedures provided in that title are inappropriate, it is suggested that at least one further exception should be made thereto.

Under the Agricultural Adjustment Act of 1938, the Secretary of Agriculture, through local committees of farmers, determines for each farm the acreage allotment, the normal yield, and the marketing quota pertaining to the respective commodities to which the statute is applicable. Thereafter, any farmer who is dissatisfied with his farm marketing quota may, under the procedure set forth in the act, have such quota reviewed by "a local review committee composed of three farmers appointed by the Secretary." If the farmer is dissatisfied with the determination of the review committee, he may either file a bill in equity against the committee in a Federal district court or institute review proceedings in a State court of general jurisdiction. In either instance, the review committee must certify and file in the court a transcript of the record upon which the determination was made, together with its findings of fact. The statute limits court review to questions of law and provides that "the findings of fact by the review committee, if supported by evidence, shall be conclusive."

The excepted situations stated in title III of S. 675 do not include the type of administrative hearing conducted by these review committees. It is believed that the failure to exempt, in one way or another, this proceeding from the provisions of title III of the bill was entirely inadvertent.

The review committee procedure is a device adopted by the Congress to democratize and localize the administration of the Agricultural Adjustment Act of 1938. It is in line with the authorization of local conservation committees to assist in the initial administrative determination of farm marketing quotas and is a constituent part of an overall administrative pattern designed by the Congress to localize, to the extent possible, the administrative machinery of the marketing quota programs.

SUGGESTION

Amend section 301 of S. 675 by striking the word "or" in line 3, page 12; by substituting a semicolon for the period in line 5, page 12; and by adding the following new subsection: "(g) proceedings of review committee established under the Agricultural Adjustment Act of 1938; or".

COMMENT NO. 7

A comparison of title III of S. 675 with title III of S. 674 reveals that the former includes, while the latter excepts, an important class of proceedings in which the administrative decision or order is subject to trial de novo by a separate and independent administrative agency or in a court. The draftsmen of S. 674 have concluded that, where a person who is dissatisfied with the action taken by an administrative agency has a right to have the controversy retried on both the facts and the law by another tribunal. It is unnecessary for Congress to stipulate the procedure which shall govern the initial proceeding, or, at least, that this class of proceedings is so different, both in nature and in legal effect, from administrative adjudication in general as to require a separate procedure. The draftsmen of S. 675, on the other hand, either be-

cause they failed to appreciate the characteristic differences between this class of proceedings and the others, or because of a belief that, if the initial hearing should be required to be formalized, there would be less likelihood that a trial de novo would be sought, have determined that the procedure in title III should be applicable to this class of proceedings.

This Department has a vital stake in the choice which may be made by the Congress between the alternative legislative proposals on this point offered by the two groups of the Attorney General's Committee on Administrative Procedure. As shown by that committee's findings (S. Doc. No. 8, p. 325), during the 3-year period from July 1, 1937, to June 30, 1940, 631 adjudicatory hearings were held before the Secretary of Agriculture. Of this number, 176 or slightly less than one-third, were proceedings on claims for reparation filed under the Packers and Stockyards Act and the Perishable Agricultural Commodities Act. It may be observed, moreover, that these figures relate to formal proceedings, and do not include the considerably larger number of reparation proceedings handled under the "shortened procedure".

Under either the Packers and Stockyards Act or the Perishable Agricultural Commodities Act, a person who has suffered damage by virtue of a violation of the statute may either file a claim for reparation before the Secretary of Agriculture or institute an action in an appropriate Federal district court. In granting the right to press such claims before the Secretary, Congress recognized that the agency charged with the administration of the statute is more adequately equipped than the courts to determine many, if not most, of the issues raised by such claims. More particularly, however, Congress took cognizance of the fact that, ordinarily, these claims involve relatively small amounts, and also that most of the claimants are farmers or "little" shippers or dealers, in whose behalf the need for an informal, expeditious, and inexpensive forum is apparent. Accordingly, opportunity was given for the filing of these claims before the Secretary of Agriculture, and, except for the bare requirement that the Secretary shall give to the respondent due notice and an opportunity for a hearing, neither of these two statutes prescribes the procedure to be followed in the adjudication of the claims.

For present purposes, reparation proceedings under the two statutes mentioned above have two characteristics which distinguish them from other types of administrative adjudication performed by the Department:

In the first place, the Department does not participate therein in an advocative capacity. The controversy is between two private persons, and the Department's function is solely that of adjudicator. The Department is not represented by counsel, it makes no attempt to introduce evidence on its own account, and does not participate in the cross-examination. While a large part of the evidence consists of the testimony of the Department's investigative staff, and of material from departmental files and records, this evidence is introduced entirely at the instance of the private disputants and is made equally available to both parties. In short, reparation proceedings under these two statutes are not "adversary" proceedings, as that term is traditionally employed, and, consequently, it is inappropriate to subject them to the procedural requisites of "adversary" proceedings.

Secondly, the Secretary's findings of fact in reparation proceedings have no final effect. Appeal to the courts from the Secretary's findings results in a trial de novo, not only because of the terms of the statutes but also because of the constitutional provision for a trial by jury of civil suits for damages in excess of $20.

Obviously, since a respondent has a right to a subsequent trial in court, which is virtually a proceeding ab initio, the principl reason for administrative, rather than judicial, disposition of reparation claims, as explained above, will have ceased to exist if the proceeding before the Department is required to be attended by the same safeguards and degree of formality as are required in "adversary" proceedings.

In reaching this conclusion, careful consideration has been given to the several provisions of title III of S. 675. The only provisions which might possibly operate to avoid the result foreseen by us are sections 307 (1) and 307 (2). Each of these subsections, in cases where it is applicable, would dispense with the necessity for an intermediate report or order of the hearing commissioner, and thereby eliminate one source of delay in the disposition of the proceedings. The clear intention of section 307 (1), however, is, as expressly stated in its caption, that certification by the hearing commissioner

shall be of "novel or complex questions". Section 307 (2) provides that "the agency tribunal, on petition of any private party therein and for good cause shown, may direct that the entire record in the case be forthwith transmitted to it for consideration and decision". To avoid the delay of an intermediate report, therefore, the complainant could, conceivably in any proceeding, seek by petition its immediate consideration by the agency tribunal. As we construe section 307 (2), however, this procedure is intended to be applicable, as in section 307 (1), only where "novel or complex questions" are involved. Under S. 675, the basic function of the agency tribunal is to serve as an appellate body; certainly, the agency tribunal is not expected to act as an initial forum in proceedings which are relatively routine in nature.

For these reasons, we conclude that neither section 307 (1) nor section 307 (2) would operate to avoid the serious delay relating to reparation proceedings as foreseen above.

SUGGESTION

It is suggested that, in addition to the new subsection suggested in connection with comment No. 6, supra, section 301 of S. 675 should be amended by adding the following new subsection:

"(h) administrative decisions, determinations, or orders subject to, or made and issued upon, trial de novo by a separate and independent administrative tribunal or in any court."

It will be noted that the amendment suggested employs the same language which appears in section 301 (a) of S. 674.

If however, it should be determined, for some reaon not apparent to us, that the amendment just suggested would be too general in its application or would otherwise be undesirable, it is suggested, in lieu thereof, that the new subsection read as follows:

"(h) proceedings between private persons under the Packers and Stockyards Act, 1921, and the Perishable Agricultural Commodities Act, 1930, in which money damages are claimed."

COMMENT NO. 8

Section 304 (4) reads, in part, that: " * * * when the evidence has been heard by a hearing commissioner opportunity shall be given to the parties in interest to request findings of fact and conclusions of law * * *".

It is not entirely clear whether this language means that the parties may merely request that the hearing commissioner shall make findings of fact and conclusions, or, as seems more likely, that the parties themselves may file suggested findings of fact and conclusions of law which they desire the hearing commissioner to adopt. In any event, the latter interpretation is preferable.

SUGGESTIONS

Amend section 304 (4) by striking out the words "request findings of fact and conclusions of law" in lines 22 and 23, p. 19, and inserting, in lieu thereof, the following: "file suggested findings of fact and conclusions of law".

COMMENT NO. 9

The ambiguity noted in comment No. 8, supra, reappears in section 307 (3) in lines 8 and 9, p. 23.

SUGGESTIONS

Amend section 307 (3) by striking out the words "request findings of fact and conclusions of law" in lines 8 and 9, p. 23, and inserting, in lieu thereof, the following: "file suggested findings of fact and conclusions of law".

STATEMENT AS TO S. 674

In the foregoing appraisal of the effect which S. 675 would have upon the work of the Department of Agriculture, it was concluded that, except in several particulars which have been described, S. 675 would not restrict unduly the Department's activities. S. 674, in its present form, would be restrictive. S. 674, however, contains several provisions which would facilitate rather than

impede the Department's work, and, in addition, the objectionable features appear to be capable of amendment without changing the basic structure of the bill. For these reasons we have endeavored to deal with S. 674 in the same manner as our treatment of S. 675, namely, to set forth, in some detail, the objectionable features of the bill, and, in connection with nearly every comment, to suggest an appropriate amendment.

COMMENT NO. 1

Sections 101 and 102, containing a declaration of policy and a definition of the term "agency," apparently contemplate that S. 674 is applicable, except where provided otherwise, to numerous governmental activities involving procedures which heretofore have not been the source of concern to either the Congress or to the courts. For the most part, administrative procedure has been the subject of legislation or of judicial review only where incident to governmental action which impinges upon private rights recognized by the Constitution. When engaging in activities such as the dispensing of bounties, the making of grants or loans, or the conferring of other forms of benefits or privileges, the agencies of the Government, either by implication or by express authorization, have been permitted to employ such procedures as they have found to be appropriate or expedient. S. 674, however, does not differentiate, at the outset, between types of activities or agencies. The question becomes, therefore, not whether a given activity or agency is subject to the bill—all are subject to it in some degree—but to what extent the activity or agency is affected by the bill. In an agency with such diverse activities as the Department of Agriculture, the enactment of S. 674 would necessitate a careful study of the bill by each unit of the Department, or with respect to each separate activity of the Department, in order to ascertain the extent to which the legislation affects such unit or such activity. Such a project, at least in the Department of Agriculture, would require considerable time and labor, and would require the expenditure of funds which are not, under existing appropriations, available to the Department.

It is important to determine, therefore, whether the advantages to be obtained from the application of the respective provisions of the bill to all the activities and agencies of the Federal Government are worth the expenditure of the necessary funds. While many of the procedural requirements of the bill are as desirable to the members of the Department as they are to the public, we believe it important that the Congress, before enactment of the bill, should be fully advised as to its cost.

SUGGESTION

We recommend that section 101 of S. 674 be amended by striking out all of its present language and substituting, in lieu thereof, the language of section 101 of S. 675.

We recommend further that section 102 (a) of S. 674 be amended by striking out all of its present language and substituting, in lieu thereof, the language of section 102 (a) of S. 675.

COMMENT NO. 2

As defined in section 102 (c), "rules" are so defined as expressly to include "rate making, price fixing, or the fixing of standards." It is not clear whether the bill regards all rate making, etc., as rule making, or whether, as the previous language of the definition suggests, only such rate making, etc., as is "of general application" would be so regarded. The ambiguity becomes even more apparent on examination of the definition of the term "adjudication" in section 102 (d), which includes proceedings involving "named persons or a named res." Many rule-making proceedings, particularly rate proceedings, involve "named persons." Sometimes the interested persons are named as parties as a matter of convenience, regardless of whether they are required by law to be so named. In proceedings to fix the fees to be charged by commissionmen or market agencies under title III of the Packers and Stockyards Act, for example, all the commission firms registered at the stockyard in question invariably are named as parties. It is probable that it is not legally requisite to name these market agencies as parties and that an order fixing commission

rates to be charged at a named stockyard would be binding upon all marketing agencies then or thereafter operating at such yards.

SUGGESTION

Amend section 102 (c) by striking out the period at the end of line 2, page 5, and adding a comma and the following: "whether or not the persons affected thereby are required by law to be named as parties to the proceeding in which the rates, prices, or standards are made or fixed".

COMMENT NO. 3

As observed in comment No. 2, above, the definition of "adjudication" in section 102 (d) does not clearly differentiate between quasi-legislative and quasi-judicial activities. Moreover, the use of the term "named res" gives difficulty. As a definition of adjudication for purposes of describing the work of a court, as distinguished from that of a legislative body, use of this term is readily understandable and would have reference to such matters as the disposition of a fund or an estate or to proceedings in rem. Analogous proceedings are extremely rare, if they exist at all, in the administrative process. Under the circumstances, use of the term "named res" within a definition of administrative adjudication invites confusion.

SUGGESTION

Amend section 102 (d) by striking the phrase "involving named persons or a named res" in lines 6 and 7 on page 5, and inserting, in substitution therefor, the following: "which do not involve or contemplate the future governance or control of persons not required by law to be named as parties to the proceedings".

COMMENT NO. 4

It is somewhat difficult to determine precisely what powers and functions of the Secretary of Agriculture could be delegated under the provisions of section 103. Subsection (a) would authorize delegation of the matters specifically indicated therein; i. e., internal management and routine, informal disposition of requests, etc., and preliminary or intermediate matters incident to rule making or adjudication. In addition, subsection (b) apparently would permit the Secretary of Agriculture to delegate any of his "powers, duties, or functions". (See line 14, p. 6.) If subsection (b) is to be so construed, there would appear to be no necessity for the more specific but less comprehensive authorization of delegation provided in subsection (a). On the other hand, if subsection (b) is not to be interpreted as granting an unlimited authority to delegate, the question arises as to what, if any, authority it does grant. Does it merely repeat the specific authority provided in subsection (a), or does it grant additional authority but not unlimited authority?

Moreover, and assuming that subsection (d) does not grant authority to delegate beyond the specific authorizations of subsection (a), it should be noted that S. 674 would not authorize the Secretary of Agriculture to delegate to any subordinate official or officials the authority to make final determinations and to issue final orders in administrative proceedings. Thus, except to the extent that the Secretary is empowered under existing legislation to delegate these functions, he would be required under this bill to give personal consideration to such matters. We do not believe that the draftsmen of the bill intend this result but that, on the contrary, they desire to authorize delegation of as much of the administrative process as is consistent with sound principles of responsibility for the management of a department or other agency.

SUGGESTION

Section 103 (b) of S. 674 should be amended by striking out all of its present language (including its caption) and substituting in lieu thereof the following:

"(b) *Powers of final adjudication.*—Subject to such supervision, direction, review, or reconsideration as it may prescribe, every agency, the ultimate authority of which is vested in a board or commission, may delegate to one or more of its members the power to decide cases after hearing or on appeal; and, where the ultimate authority in any agency is vested in a single individual, such individual may delegate such power to responsible subordinate officers or employees."

COMMENT NO. 6

Section 106 of S. 674 sets forth a general policy that investigations should be conducted with a minimum of inconvenience and embarrassment to private persons. It then provides (lines 18-22, p. 9): "In order to avoid the necessity for formal process, where deemed practicable agencies may informally request and receive sworn statements on matters within their jurisdiction with the same authority and effect as though requested, submitted, or received at authorized formal hearings." This provision is ambiguous. At least most of the agencies already have the authority to request voluntary sworn statements, and it is not apparent what additional authority is conferred by the language quoted, unless it is meant to allow the sworn statements, so received, to be considered by the agencies as evidence in the making of adjudications. It is to be hoped that such an interpretation was intended.

SUGGESTION

Section 106 of S. 674 should be amended by striking out "with the same authority and effect as though requested, submitted, or received at authorized formal hearings" now appearing in lines 21 and 22 on page 9 and substituting, in lieu thereof, the following: "and any such statement may be received at any authorized formal hearing with the same force and effect as though requested and made at such hearing, subject, however, to the right of cross-examination of the person making such statement, upon the request of any party to the proceeding in which such hearing is held".

COMMENT NO. 7

With respect to section 107 of S. 674, is the phrase "authorized by statute," in lines 4 and 5 on page 10, intended to be a limitation upon the power to issue subpenas apparently granted to presiding officers in all formal proceedings under section 309 (e) (2)? It is to be hoped that the Department, if S. 674 is to become law, will be given a broader subpena power than it has under existing legislation.

SUGGESTION

Section 107 should be amended by striking out the words "authorized by statute" in lines 4 and 5 on page 10.

COMMENT NO. 8

The first sentence of section 108 requires that "matters of record," except "personal" data or material which the agency, for good cause and "upon statutory authorization," finds should be kept confidential, shall be made available to all interested persons. Presumably, though this is none too plain, disclosure of such matters is required only where they form part of the record of a proceeding. Nor is it entirely clear what is meant by "personal" data or material. Clarification of these terms would appear to be desirable.

Of more importance, however, is the fact that statutory authorization is required for a finding that material should be treated as confidential. In at least one situation, involving the referenda conducted by the Department incident to the issuance of marketing orders under the Agricultural Marketing Agreement Act of 1937, this requirement would be harmful. It is essential that the ballots be kept confidential or there can be no free expression of opinion in these referenda.

SUGGESTION

Section 108 should be amended by striking out the first sentence thereof, and substituting, in lieu thereof, the following: "All materials which are required by law to be included in the record of a rule making or adjudicatory proceeding or upon which the agency relies in any such proceeding shall, except as otherwise provided by law, be made available to persons having a legal interest in such proceeding."

COMMENT NO. 9

Section 113 provides that the bill, except as to certain of its provisions, shall become effective 20 days after its enactment. With respect to at least one re-

quirement of the bill, 20 days are not a sufficient length of time in which to prepare for its becoming operative. Section 203 (c) provides that no agency shall act on unpublished rules, instructions, etc. It would be physically impossible to draft and publish all the various types of rules which the bill requires to be published within a 20-day period. As a result, the Department might be prevented from acting on certain of its rules solely by virtue of its inability to complete their publication within that period.

It is noteworthy in this connection that, on February 8, 1941, immediately following the issuance of the Final Report of the Attorney General's Committee on Administrative Procedure, the Secretary of Agriculture directed the Solicitor, in collaboration and conjunction with the chiefs of the several bureaus and offices of the Department, to make a careful study of the report of the Committee and to prepare for the Secretary's consideration "such revisions of the present rules of practice and procedure as appear to be appropriate in the light of the Attorney General's recommendations and practicable within existing legislation." The Solicitor and the chiefs of the bureaus and offices are now seriously engaged in this project. Their most difficult task will be the revision of rules and regulations and their publication in the manner which is recommended by the Attorney General's Committee. It is a time-consuming project, and, at the very least, it cannot, with existing appropriations and personnel, be accomplished within the period of only a few weeks. In all probability, it will be at least 6 months before these procedural changes can be substantially effected.

SUGGESTION

Amend section 113 by striking out "twenty days" in line 11 on page 16 and inserting, in lieu thereof, the words "six months."

COMMENT NO. 10

As was stated in comment No. 5, supra, relating to S. 675, we doubt that the draftsmen of either S. 675 or S. 674 intended their respective bills to be applicable to administration of the several "small claims" acts, under which this Department and other Government agencies adjust certain claims for damages to property and for personal injuries, resulting from the negligence of Government employees or from casualties occurring in Government operations. The amounts involved in such claims are uniformly small and their disposition is rarely, if ever, a matter of procedural concern.

SUGGESTION

Section 201 of S. 674 should be amended by striking out the period in line 17, on page 17, and adding the following: "; or (c) the administration of special statutory provisions relating to settlement of claims arising out of the negligence of Government employees or for damages to private property resulting from casualties occurring in Government operations."

COMMENT NO. 11

Section 203 (c) reads, in part, that "No agency shall act upon unpublished rules, instructions, or statements of policy * * *." While it is desirable to encourage, if not to require, the publication of administrative rules of all types, it is difficult to perceive the necessity for requiring publication of all types of rules prior to their becoming effective. In any event, since, by virtue of section 202 (b), statements of policy are required to be published only "so far as practicable," the requirement in section 203 (c) that no agency shall act upon unpublished statements of policy appears to be meaningless.

It should be observed further that comment No. 4, supra, relating to section 203 of S. 675, is also applicable to section 203 (c) of S. 674, in that the latter provision, requiring publication in the Federal Register of all rules before action could be taken thereon, would delay effectiveness of prorate orders and other types of orders, issued pursuant to the provisions of marketing agreements and marketing orders under the Agricultural Marketing Agreement Act of 1937, for at least 2 days. The serious consequences of such a delay have been observed in comment No. 4, relating to section 203 of S. 675.

SUGGESTION

We recommend that section 203 (c) of S. 674 be amended by striking out all of its present language and substituting, in lieu thereof, the following:

"All rules shall be published in the Federal Register, and in addition agencies shall publish their rules (as reprints of the Federal Register or Code of Federal Regulations, or otherwise) from time to time (with or without the legislation under which they operate) in pamphlet form: *Provided, however*, That staff instructions in special or individual cases or general instructions respecting matters of internal office management or routine need not be published and shall not be included in rules. No agency shall act upon unpublished rules of substance, except that rules issued within the contemplation of the provisions of any marketing agreement or marketing order entered into or issued pursuant to and after the hearing required by Public Act No. 10, Seventy-third Congress, as amended, and as reenacted and amended by the Agricultural Marketing Agreement Act of 1937, as amended (7 U. S. C., sec. 601 et seq.), need not be published before becoming effective."

COMMENT NO. 12

In comment No. 3, supra, relating to S. 675, attention was directed to the additional expense which would be involved if title II of S. 675 should be enacted. The requirements of title II of S. 674 are, in this respect, generally the same as those of title II of S. 675. Accordingly, comment No. 3, relating to S. 675, is equally applicable at this point.

COMMENT NO. 13

As section 204 is now worded, it is open to the construction that publication of the withdrawal of a rule must be made every day for a period of 30 days.

SUGGESTION

To avoid a construction which could hardly have been intended, we recommend that section 204 be amended by striking out "Until after publication of its withdrawal for not less than 30 days" in line 25, p. 20, and in line 1, p. 21, and inserting, in lieu thereof, the following: "until a period of not less than 30 days has elapsed after publication of its withdrawal".

COMMENT NO. 14

Section 209 (d) provides, in part (see lines 17-19, p. 24), that: " * * * where legislation specifically requires the holding of hearings prior to the making of rules, formal rule-making hearings shall be held".

In several statutes, the Department is required to hold hearings before the issuance of rules. In most of these instances, the hearings are not required to be formal, the statutes contemplating merely that interested persons shall be given an opportunity to express their views concerning the subject matter of the proposed rules. Thus, under section 402 of the Federal Seed Act (7 U. S. C., sec. 1592 (c)), the Secretary is required to hold a "public hearing" prior to the promulgation of "any rule or regulation" under the act. The obvious intention of Congress was not to require the Secretary to hold a formal hearing but simply to require that persons interested in the proposed rules be permitted to express their views. We do not believe that the draftsmen of S. 674 intended to require that any formal procedure shall govern hearings of this nature, but the language quoted above would seem to have that effect.

SUGGESTION

Amend section 209 (d) of S. 674 by inserting, before the word "hearings" at the beginning of line 18, p. 24, the word "formal".

COMMENT NO. 15

By virtue of section 301 (b), "the procurement or disposition of public property" is excepted from the operations of title III of S. 674. It was probably intended that this language would suffice to exempt from title III not only the

purchase and sale of public property but also regulation of the use and occupancy of the public domain and other Government lands, so as to exempt such matters as the issuance of grazing permits on national forest preserves. The language used, however, leaves some question as to whether it can be construed to embrace such matters.

SUGGESTION

Amend section 301 (h) on p. 30, lines 5 and 6, by striking out its present language and inserting, in lieu thereof, the following:
"(h) the procurement, disposition, use, or occupancy of public property; or".

COMMENT NO. 16

As was observed in Comment No. 6, supra, relating to S. 675, the proceedings of review committees established under the Agricultural Adjustment Act of 1938 are a highly specialized adjudicatory device, especially designed by the Congress to democratize and localize the administration of the marketing quota programs provided for in that legislation. For the reasons advanced in Comment No. 6, supra, relating to S. 675, it is suggested that title III of S. 674 should be made expressly inapplicable to such proceedings

SUGGESTION

Amend section 301 of S. 674 by striking out the word "or" after the semicolon in line 4, p. 30; by adding the following new subsection between lines 6 and 7, p. 30:
"(i) proceedings of review committees established under the Agricultural Adjustment Act of 1938"; and by inserting between "(a)" and the word "hereof", in line 8, p. 30, the following: "and (i)".

COMMENT NO. 17

With respect to section 305, the term "moving papers" in line 12, p. 32, is a general term embracing the specific matters which immediately precede it.

SUGGESTION

Amend section 305 by inserting, before the word "moving" at the beginning of line 12, p. 32, the words "or other".

COMMENT NO. 18

Section 309 (a) of S. 674 prohibits any presiding officer or representative of an agency engaged in preparing findings in formal proceedings from consulting or advising with "agency counsel, investigators, representatives, or employees except upon notice to all affected parties and in open hearing or otherwise * * *." It is believed that this provision is unnecessarily restrictive and that no more rigid canons of judicial ethics to govern the relationship between hearing or deciding officers and other agency personnel should be prescribed than those proposed by the majority of the members of the Attorney General's Committee on Administrative Procedure.

SUGGESTION

Section 309 (a) should be amended by inserting, after the word "not" and before the word "consult" in line 3, p. 35, the phrase "in any such proceeding"; and, further, by striking out the present language of line 4, p. 35, and inserting, in lieu thereof, the following: "employees of the agency who are or who have been connected with the proceeding in an investigative or in an advocative capacity,".

COMMENT NO. 19

Section 309 (m) (2) reads, in part, as follows: *"In unusual cases the presiding officer, may, upon the conclusion of the hearing in any case,* certify to the agency any questions or propositions of law or policy for instructions * * *".
The italicized portion of this provision is ambiguous and might be interpreted to mean (1) in unusual cases at any time and upon the conclusion of the hearing

in any case, or (2) in unusual cases upon the conclusion of the hearing in any such case. It is assumed that the latter meaning was the one intended and that the draftsmen meant that, in unusual circumstances, or where an unusual question arises, the question may be certified at the close of the hearing in any case or proceeding. In any event, clarification seems desirable.

SUGGESTION

Amend section 309 (m) (2) by striking out "In unusual cases the presiding officer may, upon the conclusion of the hearing in any case," in lines 14 and 15, p. 46, and inserting, in lieu thereof, the following: "Upon the conclusion of the hearing, the presiding officer may, in any unusual case, * * *".

STATEMENT AS TO S. 918

In dealing with S. 675 and S. 674, respectively, we have proceeded on the assumption that, in general, neither of these bills would restrict unduly the activities of the Department. Our analysis of these two bills has convinced us that, in the main, they were carefully and sympathetically drafted in order, by correcting certain abuses in the administrative process, to increase public confidence therein; and, by authorizing a more reasonable degree of subdelegation of authority within the agencies and by making available to them fairly flexible procedures in rule making and adjudication, to improve their efficiency and morale. Each of these two bills is the product of a painstaking, empirical inquiry into existing procedures and practices. In substance, these two bills avoid much of the conceptual approach which has characterized so many false starts toward the reform of administrative procedure.

Because of the basic soundness of S. 675 and S. 674, therefore, we have been enabled, in formulating our conclusions thereon, to appraise, line for line, their prospective effect upon the work of the Department, and to offer, here and there, specific suggestions as to how each might be amended so as to prevent any undue hampering of effective administration. That is to say, we have found that either of these two bills is capable of amendment without revision of its fundamental structure.

S. 918, however, is not susceptible to such treatment. Unlike the other two bills, it does not stem from a common investigative source. While, to a most interesting degree, its draftsmen have adopted, almost word for word, many of the provisions of S. 674, they have clung to several of the most controversial provisions of the Walter-Logan bill. The report of the Attorney General's Committee is at complete variance with these provisions.

The requirement in section 302 (c), for example, that each agency shall issue, within 1 year after the enactment of any statute hereinafter enacted, all rules implementing or interpreting the terms of any such statute, was taken from the Walter-Logan bill. (As a matter of fact, section 302 (c) is even more restrictive than its counterpart, section 2 (b), in the Walter-Logan bill, for the latter provision contained the qualification that the issuance of such rules should be "subject to the adoption thereafter of further rules from time to time as provided in this Act.") Despite the numerous illustrations which were offered by the various agencies in connection with the Walter-Logan bill to show the impracticability of fixing a time limit upon the issuance of administrative rules, the same inflexible requirement persists in section 302 (c) of S. 918.

The Walter-Logan bill reappears, also, in section 303 of S. 918, which differs from section 2 (a) of the Walter-Logan bill only in that section 303 of S. 918 requires public hearings to preclude rule making only if requested.

The Walter-Logan bill is further reproduced, either in exact language or in essence, in section 303 (d) of S. 918, exempting from liability any acts or omissions more than 30 days after publication of the rescission or invalidation of rules, but providing no saving clause, such as appears in S. 674, whereby the agencies, upon published findings of emergency, may effectuate rescissions at any specified time; and in section 400 (b), permitting the courts, in proceedings to review administrative rules, to take evidence instead of referring the cases to the agencies for that purpose.

As previously observed, many of the provisions of S. 918 have been lifted bodily from S. 674. For this reason, a casual comparison of these two bills gives the impression that, in general, they are similar, and that the draftsmen of S. 918 have drawn heavily from the findings and conclusions of the

Attorney General's Committee, or at least from those of the minority of its members. A more careful comparison of the two bills, however, will show that S. 918 incorporates most, if not all, of the restrictive provisions of S. 674, but few, if any, of those provisions of the latter bill which would permit administrative procedure to become less formal and cumbersome. No provision appears in S. 918 equivalent to section 103 of S. 674, or to section 103 of S. 675, permitting the heads of agencies to delegate authority to manage the internal affairs of the agencies; to dispose informally of applications, complaints, etc.; to issue formal complaints and other moving papers; and to issue the final orders or decisions. Even though section 600 of S. 918 appears to adopt some of the provisions of section 303 of S. 674, authorizing agencies to make informal disposition of adjudications or controversies, the possible benefit of this authorization is destroyed by the requirement, in section 600 of S. 918, that "any settlement by way of compromise of any controversy shall not become effective until approved by the highest or ultimate authority of the agency concerned, and the facts with respect thereto should be stated in the annual report of the agency making such compromise settlement". In this connection, also, should be noted the requirement in section 708 (f) (6) of S. 918 that "no off-the-record proceedings, statements, or argument shall be authorized or permitted in any formal hearing before a presiding officer or any agency". Rigid compliance with this requirement might preclude settlement of cases after the formal hearing has convened, as compromise settlements frequently flow from off-the-record discussions. A similar result is probable from section 702 of S. 918, which, like section 309 (g) of S. 674 and section 304 (3) of S. 675, authorizes presiding officers to hold off-the-record conferences to consider simplification of the issuance, stipulation of facts, etc., but, unlike S. 674 and S. 675, does not authorize the holding of such conferences after the hearing has commenced.

Among other illustrations of the failure of S. 918 to adopt, along with the restrictive provisions of S. 674, the empowering or facilitating provisions of the latter bill, are the following: (1) Section 111 of S. 674 authorizes the President, whenever he finds, on the joint recommendation of an agency and the Office of Federal Administrative Procedure, that the particular application of any provision of S. 674 would be unworkable or impracticable, to suspend such application of such provision. S 918 provides no such device. (2) S. 674 requires and S. 675 empowers the agencies to issue declaratory rulings when necessary to terminate a controversy or to remove an uncertainty. S. 918 neither authorizes nor requires the issuance of such rulings. S. 674 empowers the agencies (3) to adopt procedures for the disposition of cases on written evidence, especially as to technical and well-established data [sec. 309 (1) (2)], and (4) to take official notice of generally recognized facts, or technical or scientific facts of established character [sec. 309 (j)]. S. 918 gives no such authority.

Finally, S. 918 contains at least two provisions which are entirely original and, so far as we have been able to ascertain, were not suggested to any member of the Attorney General's Committee or of its investigative staff. Certainly neither of these particular provisions, prior to the introduction of S. 918, had received the formal approval of either the board of governors or the house of delegates of the American Bar Association, despite the fact that, at the time of its introduction in the Senate, S. 918 was described as "in a measure, a revised edition of the Walter-Logan bill, and was prepared by a committee of the American Bar Association." (Congressional Record, Feb. 19, 1941, p. 1184.) Indeed, we are now advised that, since S. 918 was introduced, both the board of governors and the house of delegates of the association have indicated their disapproval of this bill.

One of these entirely novel proposals is section 200, which limits to members of the legal profession the authority to appear in a representative capacity in proceedings involving (a) the decision of questions of law, and (b) the preparation of a record which may be the basis for judicial review. It may be, and we so construe it, that this provision would be interpreted to mean appearance in the courtroom sense of the term; if so, the requirement that only lawyers may appear in a representative capacity is limited to cases or proceedings which are subject to titles VII and VIII of the bill. Even so, the requirement overlooks one of the basic characteristics of administrative proceedings. Predominantly, they involve subject matter for the handling of which the judicial system and the legal profession have not as yet been equipped and trained. It was largely in recognition of that fact that administrative agencies have been created. To the extent that there is a bar of practitioners of administrative law, it is by no means confined to

lawyers, but includes a large number of specialists in one field or another—economists, accountants, engineers, etc.—who have had no formal legal training, but who, in their respective fields, are as well qualified to represent parties to administrative proceedings as lawyers in general. While it is true that lawyers, by and large, are better equipped to deal with "questions of law" and "the preparation of a record which may be the basis for judicial review," it is equally true that, in many administrative proceedings, there are specialists in fields other than the law, who, either through long experience or through particular aptitude, have acquired a working knowledge of administrative law and procedure, and, as a result, have become more capable practitioners before some agencies than average members of the legal profession. In addition to this consideration, the requirement overlooks the fact that a very large percentage of persons involved in controversies with administrative agencies—especially in "controversies" as broadly defined as in S. 918—are persons of low incomes, and, in many instances, of little education. To permit such persons to be represented only by lawyers would, where lawyers' fees are prohibitive, deprive them of the right to any sort of representation.

The second novel provision is section 708, which requires all formal hearings (except where the person concerned requests otherwise or where contrary to the public interest) to be held "in the vicinity of the place where such person resides or has his principal place of business"; and requires that, with respect to all such hearings outside the District of Columbia, the presiding officers shall be selected and appointed by United States district judges from persons in private practice, who shall have had not less than 10 years' experience at the bar. Section 708 further provides that the presiding officer shall be paid a per diem to be fixed by the district judge, but not to exceed a proportionate rate of $10,000 per annum. The adoption of this provision would pierce the heart of the administrative process. By this proposal, its draftsmen have demonstrated, far more than in any other provision of S. 918, or, for that matter, than in any provision of the Walter-Logan bill, their deep-seated bias against the participation by personnel of executive or administrative agencies in quasijudicial activities. Their proposal, in effect, repudiates the major premise upon which administrative adjudication is based, namely, that the finding of facts in technical and specialized fields is a task requiring expert knowledge and training. Like the novel provision discussed above, this proposal exaggerates the role and qualifications of practitioners of law, without differentiating between the specialties of individual lawyers. This failure to give recognition to the necessity for selection of exactly the right man for the task is especially significant with relation to the selection of presiding officers. It is crucially important when coupled with the requirement of segregation of the presiding officer from the investigative and advocative personnel of the agency and with the provision permitting the presiding officer's decision, unless appealed from, to become the final decision of the agency.

The greatest single objection to segregation of hearing or deciding officers from other administrative employees is the danger that the hearing or deciding officer would lack the proper experience to make an informed and intelligent decision in the case, due to the fact that his experience with the details and complexities of administration would be limited to the relatively small number of cases or situations which ripen into formal administrative proceedings. The great majority of the cases or situations arising under any particular statute are settled prior to the stage of formal adjudication. Furthermore, the hearing officer would be deprived of the valuable assistance and counsel of those persons who have an intensive and constant contact with the problems involved. To the extent that S. 674 and S. 675 would require segregation of hearing and deciding officers from advocative and investigative personnel, they create this danger that the administrative process will be deprived of the advantages of expertness, but, at the same time, they provide a measure of safeguard against such danger by recruiting presiding officers from agency personnel or at least by providing that such officers shall be full-time, permanent employees of the agencies; this tends to provide a more experienced staff of hearing officers. S. 918 creates the same danger in an aggravated form but furnishes no compensating safeguard: there is no attempt under S. 918 to provide men with specialized experience. Its provision for appointment of hearing officers would have an opposite effect—that of dispersing the work among a large number of hearing officers so that few, if any, could obtain any real concentrated experience in the field.

S. 918, in short, would be harmful to the activities of this Department because (1) it retains some of the most damaging provisions of the Walter-Logan bill

to which, for reasons which were set forth at length in the several reports which this Department transmitted to the Congress relating to that bill, strenuous objection was taken; (2) it adopts most, if not all, of the restrictive provisions but few, if any, of the facilitating provisions of S. 674; and (3) it contains at least two requirements which are entirely novel in character and which, if adopted, would thwart the objective of the administrative process as an agency for the effectuation of social legislation.

UNITED STATES DEPARTMENT OF AGRICULTURE,
OFFICE OF THE SOLICITOR,
Washington, D. C., April 5, 1941.

Hon. WARREN R. AUSTIN,
United States Senate.

DEAR SENATOR AUSTIN: During the course of my testimony last Wednesday before the subcommittee of the Senate Committee on the Judiciary considering S. 675, S. 674, and S. 918, you asked me, if I recall correctly, whether it could be said, as a general proposition, that wherever a statute requires notice and hearing as a procedural prerequisite to the issuance of administrative rules of substance, the statute requires a formal hearing to be held. There was some discussion on this point, and my reply, again if I recall correctly, was that the statutes did not go that far, and that (except in the field of public utility and common carrier rate making) there are only four or five instances in Federal legislation in which a formal hearing is required in connection with the issuance of administrative rules of any character. These include the proceedings under (1) the Agricultural Marketing Agreement Act of 1937, preliminary to the effectuation of marketing agreements and the issuance of marketing orders; (2) the Bituminous Coal Act of 1937, preliminary to the issuance of regulations that have "the force and effect of law"; (3) the Fair Labor Standards Act, preliminary to issuance of orders establishing wage rates for particular industries; and (4) the Federal Food, Drug, and Cosmetic Act, preliminary to the promulgation of specifically enumerated types of regulations, of which most frequently issued are those fixing reasonable standards of identity, quality, and fill of container for various classes of food.

It so happens that I have given rather extended consideration to existing procedural requirements in rule-making proceedings, in connection with a series of procedural studies which were made during the past 3 years in the Department of Agriculture. This project, incidentally, was begun several months before the establishment of the Attorney General's Committee on Administrative Procedure, and was pursued quite independently of the work of that committee. Because of our studies, however, the Attorney General's Committee did not prepare separate monographs dealing with activities of this Department, with the single exception of the procedures and practices under the Packers and Stockyards Act.

The Attorney General's Committee's monographs have been printed as Senate documents. Our studies have not been printed and we have been able to make them available only in mimeographed form to a limited number of people.

In the thought that you may be interested in the discussion of procedural requirements in rule-making proceedings, as set forth in several portions of our studies, I am taking the liberty of sending you, under separate cover, these monographs which constitute our own series of studies.

Sincerely yours,

ASHLEY SELLERS, *Head Attorney.*

SUPPLEMENTARY STATEMENT AND MEMORANDUM OF THE TREASURY DEPARTMENT BY DANIEL W. BELL, THE UNDER SECRETARY

TREASURY DEPARTMENT,
Washington, September 3, 1941.

Hon. CARL A. HATCH,
Chairman of the Subcommittee of the Senate Committee on the Judiciary Considering S. 674, S. 675, and S. 918, Seventy-seventh, Congress, United States Senate.

MY DEAR MR. CHAIRMAN: You will recall that when I testified before your subcommittee on April 15, 1941, relative to S. 674, S. 675, and S. 918, the so-

called administrative-procedure bills, I advised you that it was not my intention at that time to make a detailed statement as to the impact of each of the three bills on every bureau and activity of the Treasury Department but that with your permission I would like to supplement my general statement with a more specific report to be included in the record at a later date. You very graciously granted my request, and accordingly I enclose a detailed memorandum statement on the subject.

At the outset, however, I should like to summarize very generally the Treasury Department's position with respect to the three bills under consideration.

(A) S. 675

The Treasury Department (subject to certain comments and specific amendments set out in this letter and the accompanying statement) favors the enactment of S. 675, the so-called majority bill of the Attorney General's Committee on Administrative Procedure. As I told your subcommittee when I testified before it on April 15, 1941, this bill will: (1) Provide a continuing and searching over-all scrutiny of administrative procedures and thus have the desirable effect of keeping agencies on their toes in these respects; (2) fix responsibility for administrative decision to a more appreciable extent than is the case today; (3) extend the degree of public participation in the rule-making process; (4) provide a considerable degree of separation between the functions of judging and prosecuting; and (5) authorize declaratory rulings on the part of the administrative agencies, so that citizens may be apprised in advance with some degree of certainty of what their rights and liabilities will be in connection with future business commitments or other contemplated action on their part. Moreover, the bill will, we think, accomplish all these desirable reforms without impeding administrative activity unduly, since it provides a fairly wide degree of flexibility to cover the abnormal situation.

There are, however, certain aspects of the impact of this bill on the Treasury Department, and particularly on its Bureau of Internal Revenue, which deserve some special comment, and with respect to which the Treasury Department believes amendments are desirable, or bases its approval on a construction of particular provisions of the bill which may possibly be susceptible of other constructions.

1. *Section 103 of Title I*

Subsection (a) of this section authorizes, among other things, the delegation of authority to make informal settlements of cases. Assuming that the Board of Tax Appeals would be an "agency" or an "agency tribunal" under section 102 of the same title, that Board might, under this provision, be authorized to delegate to its members or other officers the power to dispose of cases informally. Section 1116 of the Internal Revenue Code dealing with hearings before the Board of Tax Appeals provides that: "Notice and opportunity to be heard upon any proceeding instituted before the Board shall be given to the taxpayer and the Commissioner." If, therefore, the Commissioner has a statutory right to an opportunity to be heard and the Board has the authority to make an informal settlement of a controversy, even though the Commissioner objects, it is evident that there would be two completely inconsistent statutory provisions on the books. I do not believe that section 103 was intended to authorize the creation of any power, but merely the delegation of powers conferred by present or future laws other than S. 675. However, this should be made clear. This could be accomplished by adding the following new subsection at the end of section 103:

"(d) Nothing in this section shall be deemed to authorize the delegation of any power or authority not conferred on the delegating agency, agency tribunal, or individual by or pursuant to other provisions of law."

2. SECTIONS 106 AND 107 OF TITLE I

The provisions of these two sections outlining the duties of the Director of the Office of Federal Administrative Procedure would appear to be in conflict with the statutory provisions detailing the duties of the Congressional Joint Committee on Internal Revenue Taxation, as set forth in Section 5011 of the Internal Revenue Code. In addition, they would seem to be in conflict with the provisions of section 3790 of the Internal Revenue Code prohibiting ad-

ministrative review of Commissioners' decisions, except as provided by statute in the Board of Tax Appeals procedure.

The Treasury believes that the supervision of internal revenue matters by the Joint Committee on Internal Revenue Taxation is clearly the preferable method of policing the Bureau both from the historical standpoint and from the standpoint of specialized control. As you know, the Joint Committee on Internal Revenue Taxation is composed of 5 members from the Senate Committee on Finance and 5 members from the House Ways and Means Committee, together with a complement of experts and clerical assistants. It has the power and duty to investigate and make reports concerning every phase of Internal Revenue administration, and has in the past afforded an efficient and direct control over revenue matters. I believe it would be an unwise and burdensome duplication of existing authority to give a new agency the same type of control over the Bureau's activities.

3. SECTION 203 OF TITLE II

This section provides that regulations shall not take effect until at least 45 days after the date of their initial publication in the Federal Register. There is a flexibility clause in the same section that the foregoing time limitation may be reduced or eliminated by certification of the agency, published along with the regulations in the Federal Register, that stated circumstances require the effective date to be advanced as specified. The flexibility clause is sufficiently broad to cover any situation in which it may be desirable that regulations should become effective immediately or after any period less than 45 days.

I wish to point out, however, that with respect to most types of Treasury regulations, notably those dealing with internal revenue, customs, fiscal, financing, monetary, and banking matters, and foreign funds control, it will be the rule rather than the exception that the public interest will be best served by making the regulations effective immediately or almost immediately upon promulgation and publication. Under section 203 of S. 675, it will be necessary in these cases to incorporate a more or less standard provision in such regulations that stated circumstances require the effective date to be advanced as specified. The Treasury Department will not object to this procedure, but for obvious reasons, it desires to advise the Congress what the situation will be in advance.

4. TITLE III

Section 301 of title III (dealing with administrative adjudications) applies the provisions of sections 302 to 309, inclusive, of that title solely to proceedings wherein rights, duties, or other legal relations are required by law to be determined after opportunity for hearing, and, if a hearing be held, only upon the basis of a record made in the course of such hearing. Although it appears that practically all of the deciding functions of the Bureau of Internal Revenue would be excepted from the operation of title III because (1) a hearing is not required by law, and (2) the decision is not predicated entirely upon the basis of a record made in the course of such hearing, the words "required by law" might be construed to embrace a hearing, or an opportunity for hearing, granted a taxpayer by regulations or Bureau mimeographs, which have the force and effect of law. The United States Supreme Court has often held that a departmental regulation within the reasonable scope of statutory language or authorization has the force and effect of law. It would seem, therefore, that it might be forcefully contended that the Bureau determinations made as a result of said conferences are "required by law to be determined after opportunity for hearing." The word "record" as used in section 301 is dangerously ambiguous. The Commissioner's determinations, or those of Bureau employees having delegated authority from the Commissioner, are not necessarily made upon the basis of a record developed at a hearing. This may or may not be true. In order to avoid the danger of arbitrary and capricious conduct by staff conferees, they have been instructed in group meetings to predicate their findings of fact and conclusions of law on the record. The only record in a case might well be the one prepared at a conference specifically provided for under the formal decentralization procedure.

Subsection (a) of section 301 would also except proceedings in which a hearing for the purpose of receiving evidence is held before the agency tribunal, or before one or more individual members of an agency tribunal. The meaning of

this subsection is somewhat obscure. Practically every hearing conducted in the Bureau in a tax controversy is in whole or in part "for the purpose of receiving evidence." In fact, in most cases the preponderance of effort and thought of the conferee is directed to the elusive problem of getting all the facts and assembling reasonably satisfactory evidence of such facts in the administrative file of the case, or in what is commonly called the record of the case.

It is not believed that it was the intention of the drafters that title III should be applicable to the adjudication proceedings of the Bureau of Internal Revenue, except to the extent that such proceedings are specifically required by statute (1) to be finally determined after an opportunity for hearing, and (2) if such a hearing be held, to be finally determined only upon the basis of a formal record made in the course of such hearing. Virtually all of the functions of the Bureau of Internal Revenue would be excepted under such construction. The most notable which would still be within the scope of title III would be functions under the Federal Alcohol Administration Act which were transferred to the Alcohol Tax Unit of the Bureau of Internal Revenue by Reorganization Plan No. III, effective June 30, 1940, and the functions of the Alcohol Tax Unit in connection with the revocation of industrial alcohol permits.

On the assumption (which is not entirely free from doubt) that this is the proper construction of section 301, which outlines the application of title III, the Treasury Department will not object to these provisions. If a wider construction were to be given to the section, however, this Department believes that its efficiency in the administration of internal revenue laws would definitely be impaired and would find it necessary to object, and ask that the Bureau of Internal Revenue be specifically excepted from the operations of sections 302 through 309. However, this is of course an over-all problem applicable to many other agencies, and the Treasury Department, therefore, hesitates to suggest any language which would more definitely state the scope of title III. In view of these circumstances and the importance of the problem, I hope that your subcommittee will give special consideration to this question of construction.

3. [illegible]

This title authorizes declaratory rulings. The Treasury Department is in sympathy with the purpose of these provisions. To the fullest extent practicable, a citizen should have an opportunity to ascertain in advance from his Government what his rights and liabilities will be with respect to a stated course of projected action on his part which may be affected by governmental action, so that he may make commitments with reasonable certainty. However, this may not be feasible in every field of governmental activity. Thus, the Treasury Department believes that, insofar as administration of the internal revenue laws is concerned, declaratory ruling procedures are not practicable and that prospective closing agreements, as authorized by existing law, afford the best solution of this problem. The position of the Department coincides in this respect with that expressed by the Senate Committee on Finance in connection with the revenue bill of 1935, and is more fully developed in the Bureau of Internal Revenue comments on the so-called minority bill (S. 674) in the memorandum statement accompanying this letter. However, since S. 675 provides that the exercise of this power may not be compelled, and is in effect discretionary with the administrative agency, and in view of the further fact that section 404 of S. 675 provides that nothing therein shall affect or modify the provisions of law relating to closing agreements, these provisions are not regarded as being vitally objectionable from the standpoint of the Treasury's Bureau of Internal Revenue.

Declaratory rulings are of little value, however, unless they are binding for at least a fixed period of time on the agency which issues them. Section 402 of title IV is most ambiguous in this respect. It provides that a declaratory ruling shall, in the absence of judicial reversal, have the same force and effect and be binding in the same manner as a final order or other determination of the agency tribunal which issued it. There would not appear to be anything in the bill which would indicate that final orders of agency tribunals may not be reconsidered and reversed by the agency tribunal in question at any time before the matter has gone to the courts. See section 308 of the bill. A declaratory ruling which may be reversed tomorrow by the agency issuing it is not particularly helpful to the citizen. I, therefore, recommend that your subcommittee give consideration to providing that declaratory rulings under title IV of S. 675 shall be binding on the agency tribunal issuing them for not less than a fixed period of time, such as a year.

Further comments and suggestions in connection with S. 675 will be found in the detailed memorandum which I am transmitting with this letter, but the foregoing represent the more important recommendations which this Department wishes to make in connection with that bill.

(B) S. 674

The Treasury Department recommends against the enactment of S. 674. The bill does not properly distinguish between the different types of functions exercised by the various agencies of the Government but would blanket them all (with a few not entirely logical exceptions) under a general administrative code, regardless of whether the functions involved were truly regulatory, quasi-regulatory, or purely executive. Most of the Treasury's functions would be subject to the provisions of the bill, though there are some very limited and vaguely worded exceptions in title II (dealing with administrative rules and regulations) which might be construed to authorize the President to except a very few of the many Treasury functions from that title. Some substantial mandatory exceptions, so far as the Treasury is concerned, are provided in title III (dealing with administrative adjudications), but these still leave a majority of the Treasury's work within the scope of the title's operation, and the Department has been unable to discover any reasoned pattern to these exceptions, insofar as its activities are affected.

As I told you in my testimony of April 15, before your subcommittee, the Treasury Department is essentially a service agency for the Government as a whole and not a regulatory agency. In only one or two instances does it exercise regulatory functions of a quasijudicial or quasilegislative character. Its principal functions are (1) to collect the Government's revenues, (2) to borrow the money necessary to make up the difference between these revenues and operating expenses of the Government, (3) to act as custodian of the Government's moneys, (4) to pay the Government's bills, (5) to keep the Government's books, (6) to manufacture the Government's paper and hard money, as well as its securities, (7) to purchase a major portion of the Government's supplies, and (8) through its enforcement agencies to enforce many of the Federal criminal and penal laws.

These functions are not in any sense regulatory. Their primary objective is the maintenance of the governmental organization as a going concern. They extend to every branch of the Government and involve in some way nearly every one of its activities. They must be conducted with a maximum of prompt and efficient service to the operating agencies. To the extent that the Treasury is impeded or delayed in the performance of these service functions, the whole machinery of the Government will slow down.

It is a cardinal principle in connection with service functions of this character that they be administered expeditiously and with a minimum of formal technical requirements and expense.

The Treasury is already subject to the continuous scrutiny of the Congress and the appropriate committees thereof, and to the daily examination and review of the General Accounting Office and the Bureau of the Budget, in connection with the conduct of all its service operations. I believe that these are checks and balances far more substantial than those under which any private business conducting the same activities would operate. To cumulate on these the many formal requirements of S. 674, in connection with rules and regulations, administrative adjudications, and other administrative matters, would be, in the opinion of this Department, a most serious mistake, and one which would prejudice not only the successful operations of the Treasury Department but those of every other agency of the United States. The fact that the provisions of S. 674 are in many cases hortatory, and that there is some flexibility in its provisions, lessens but does not eliminate the objectionableness of the bill, insofar as this Department is concerned. If mandatory administrative procedural legislation similar in substance to S. 674 should not be applied to the activities of the Treasury Department (and the Department believes it should not), we think that it is almost equally desirable that discretionary or voluntary legislation of the same character should not be applicable.

If your subcommittee should determine to report S. 674 favorably, the Treasury strongly recommends that its activities be entirely excepted from the operative ambit of the bill.

A more detailed discussion of the impact of the bill on various Treasury activities is contained in the memorandum transmitted with this letter.

(C) S. 918

The Treasury's activities are almost entirely excluded from the operations of this bill by its express terms. In connection with its functions thus excepted, however, the bill makes its provisions "advisory to be adopted in whole or in part by rule of any agency as to its functions excepted in whole or in part by this section" (sec. 900). S. 918 contains some of the objectionable features of S. 674. In addition, it retains a number of the defects which led to the President's veto of the Walter-Logan bill during the last session of the Seventy-sixth Congress. For these reasons, and for reasons similar to those stated above in connection with my discussion of S. 674, the Treasury Department is strongly opposed to the enactment of S. 918.

A more detailed statement of the impact of this bill on Treasury activities is contained in the memorandum transmitted with this letter.

In conclusion I should like to say that the Treasury Department is most heartily in favor of any legislation that will improve the administrative processes of government. Subject to the comments which have already been made, I believe that the enactment of S. 675 would be a constructive step in that direction.

Very truly yours,

D. W. BELL,
Acting Secretary of the Treasury.

MEMORANDUM STATEMENT CONTAINING TREASURY COMMENTS ON THE EFFECT OF S. 675, S. 674, AND S. 918, SEVENTY-SEVENTH CONGRESS, ON THE ACTIVITIES OF THE TREASURY DEPARTMENT

S. 675

BUREAU OF INTERNAL REVENUE

The Treasury's specific comments with respect to the effect of S. 675 on the Bureau of Internal Revenue are contained in Acting Secretary of the Treasury Bell's letter transmitting this memorandum statement. See also Mr. Bell's testimony of April 15, 1941, before the Senate Judiciary Subcommittee considering the three administrative procedure bills.

S. 675

BUREAU OF THE COMPTROLLER OF THE CURRENCY

The principal functions of the Bureau of the Comptroller of the currency relate to the following:

(1) The chartering of new national banks; the consolidation of two or more national banks, or State and national banks; reorganization of those banks which get into financial difficulties; and the issuance of branch permits.
(2) The supervision of all national banks with the view of obtaining compliance with the applicable Federal laws and adherence to the principles of safe and sound banking practices.
(3) The liquidation of national banks for which the Comptroller has appointed receivers, generally on the ground of insolvency.

A national banking association may not commence the business of banking until it has obtained the consent of the Comptroller of the Currency. In determining whether an applicant (which may be a new bank or an established State bank which desires to join the national banking system) should be authorized to operate as a national bank in the community, the Comptroller must form a judgment based upon information obtained by highly trained national-bank examiners with respect to many factors, among which are (1) the adequacy of the bank's capital structure; (2) its future earnings prospects; (3) the general character and ability of its management; (4) the convenience and needs of the community to be served by the bank; and (5), in the case of a State bank, its financial history and present condition.

In arriving at a decision concerning these matters, it is inadvisable for the Comptroller to hold public hearings at which evidence is produced with regard to the financial condition of the bank or the character and capability of its proposed management. To do so would in many instances serve only to embarrass, unjusti-

fiably, the proposed management. It is obvious that much of the information obtained by the investigating bank examiners and other representatives of the Comptroller is of a highly confidential nature and that the persons contacted would be willing to speak freely when knowing that their statements will be treated as confidential, whereas they would hesitate or refuse, perhaps, to divulge important facts or information if asked to do so on the witness stand at a public hearing. In addition, the circulation of damaging statements and rumors, although subsequently proved false, would tend to discredit a bank and destroy confidence of the public in banks as a whole.

Consequently, the Comptroller does not hold hearings in connection with the issuance of certificates authorizing national banks to commence the business of banking, etc., but, instead, he requires a thorough investigation by national-bank examiners who are trained in the business of sifting the evidence and forming conclusions concerning the elements and factors involved. After the investigation has been made, the examiner's report is analyzed to see that all applicable laws are being complied with and then the application is passed upon by the chief national-bank examiner and the three deputy comptrollers, who exercise a degree of informed judgment which could not be equaled by persons not possessing their training and experience.

Supervision and regulation of national banks is carried on mainly through examinations. In accordance with statute, the Comptroller employs carefully selected and trained examiners, who examine every national bank at least twice each year. The examiner analyzes the assets and liabilities of the bank for the purpose of determining its soundness and the policy and methods of operation of its management and ascertaining whether all applicable laws are being complied with. In the course of conducting an examination, many questions arise with respect to the proper interpretation of the various provisions of the National Bank Act and other applicable statutes, especially those sections which place limitations upon the loans and investments in which bank funds can be invested. In many other instances similar questions are raised voluntarily by the bank's management. In such circumstances the questions are submitted to the Comptroller of the Currency. The answers to such questions are usually specific rather than general, and constitute in some cases rulings upon existing situations and in other cases advisory opinions by the Comptroller for the guidance of examiners and banks. Those rulings and advisory opinions, based upon both legal and economic principles, are appropriately filed and used as precedents.

In this field also, formal hearings are not held at which the questions presented can be argued, although the Comptroller and his staff are always available for conference and in formal discussion with bank officers. The number of instances in which decisions must be made are too numerous to permit of such hearings, and unfortunately most of the problems which arise are not, in the nature of things, of a type which could be effectually dealt with by promulgation of general rules or instructions. Each is an individual problem, although necessarily governed by principles and standards of sound judgment which can best be developed and explained in the course of their application to a concrete situation. For this reason, the overwhelming majority of problems dealt with by the Comptroller's Office are handled on a case-by-case basis as each particular question arises in specific banks. Effective use of this case-by-case method is possible because of the existence of a unified coordinated field force of examiners readily available to national banks at all times and makes its unnecessary to have published rules and regulations.

The Comptroller of the Currency is charged with the duty of liquidating all national banks for which he has appointed receivers, either because of insolvency or violations of specific statutes. In order to perform this function, the Comptroller has established an Insolvent Division, located in Washington, which supervises the work of all the field receivers. In the course of supervising the liquidation of closed banks, hundreds of problems arise each day upon which both legal and administrative decisions must be made promptly.

The variety and scope of the administrative and legal problems involved in this liquidation work are extremely extensive and are by no means confined to the technical questions arising under the national bank statutes. This will be readily apparent upon realization of the various types of assets which are to be found in national banks; not only notes, drafts, bills of exchange, investment securities, and other evidences of debt, but residences, apartment houses, farms, factories, mills, and miscellaneous properties and stocks which have been acquired by foreclosure or surrender incident to the enforcement of collateral security. In collecting and converting into cash the assets of a given bank, it

is necessary that numerous adjustments be made with debtors who are financially unable to pay their obligations. Both real and personal property held by the bank must be sold to the greatest possible advantage. Any stock assessment liability must be enforced. Claims for offsets, preferences, etc., must be thoroughly analyzed, and, if necessary, defended in the courts. Trust estates for which the bank was acting in a fiduciary capacity must be administered. The amount and character of liabilities must be determined. There must be a determination as to whether the directors of the failed bank are subject to either statutory or common-law liability for losses resulting from their acts or failures to act. The legal and economic problems involved in liquidation work, and upon which decisions must be made by the Comptroller's Office, include practically every type of question with which lawyers and bankers are faced in the business world.

The solution of such problems requires the application of special legal and banking knowledge on a case-by-case basis. General rules could not be successfully formulated, if for no other reason than because such "rules" would be practically as numerous as the problems themselves.

Sections 301 and 309 of S. 675 do not appear to be applicable to this Bureau, since the Comptroller is not required by law to determine any "rights, duties, or other legal relations * * * after opportunity for hearing." Furthermore, the specific partial exemption contained in section 301 (c)—"proceedings which precede the issuance of a rule, regulation, or order involving the future governance or control of persons not required by law to be parties to the proceedings"—seems to exempt this Bureau. The remaining sections of title III, although not made inapplicable by the language of section 301, clearly were not intended to apply to it. Since, as shown above, the procedures followed by this Bureau do not include any hearings whatsoever, there is no formal record such as is referred to in section 310; and, as a matter of practice, the Comptroller's decisions are not subjected to judicial review.

On the whole, assuming that title III is not applicable to the office of the Comptroller, it appears that S. 675 would not interfere seriously with or impede the work of the Bureau of the Comptroller of the Currency. In this connection it is to be noted that, with a few comparatively minor exceptions, the members of the general public have no claims against nor controversies with this Bureau, and the impact is not between members of the public and the Bureau but between the general public and the various national banks in which their deposits are made and with whom they deal directly; whereas the primary objective sought to be accomplished by this and the other bills by hearings, hearing commissioners, the formulation and publication of rules, decisions, and so forth, is to afford procedural remedies to members of the public having claims against or controversies with the various agencies with which they deal directly.

S. 675

BUREAU OF CUSTOMS

Section 201 (2) raises a serious question insofar as that provision requires publication of "general policies." For example, the Bureau and the Department have developed certain more or less well-defined policies with respect to the remission or mitigation of fines, penalties, and forfeitures under the authority of section 618 of the Tariff Act of 1930. By the terms of the latter, the Secretary of the Treasury has unlimited discretion, but an effort to administer even-handed justice requires the application of some standards by which different cases may be compared. On the other hand, there is so much difference in the facts of the cases, that no fixed formula will operate satisfactorily. It might be misleading to the public to publish these general standards, and it might also be unwise to put the potential violators of the customs laws on notice of the risks involved therein. However, the use of the word "general" will probably provide some flexibility. In this connection, it may be advisable to make an exception with respect to the general policies adopted in the administration of the penal laws as distinguished from laws primarily dealing with the normal collection of the revenue.

A puzzling question is raised by the relation between section 203 of the bill and section 315 of the Tariff Act, as amended. The latter section provides that no administrative ruling resulting in the imposition of a higher rate of

duty than was applicable under an established and uniform practice shall be effective prior to the expiration of 30 days after the date of publication in the weekly Treasury Decisions of notice of such ruling. Perhaps such a ruling would not be a regulation within the meaning of section 203 of the bill. However, the question is not free from doubt.

Sections 301 to 309 apply only to proceedings required by law to be determined after an opportunity for hearing, etc. In customs matters, there appears to be no such requirement except in the case of disciplinary proceedings against customhouse brokers under section 641 (b) of the Tariff Act. It is true that sections 509–511 of the Tariff Act authorize the collectors and appraisers to conduct hearings, but they are not required to do so.

Section 404, providing for judicial review of a declaratory ruling "in the manner and to the same extent as final orders or other determinations of that agency tribunal," is not worded so as to apply to the Bureau of Customs as clearly and broadly as is desirable. Under the Tariff Act, final administrative determinations regarding classifications are made, insofar as importers are concerned, by the collectors of customs, and final administrative determinations regarding appraisements are made by the appraisers. It may be questioned whether, under the Tariff Act and section 404 of the bill, declaratory rulings regarding appraisement or classification, applicable to more than one port of entry, could be made by the Commissioner of Customs, and whether such determinations would be subject to judicial review by the Customs Court, since the procedure established by the Tariff Act for review of determinations regarding appraisement or classification involves a protest or appeal for reappraisement by the importer against decisions of a collector or appraiser, and the transmission to the customs court of this protest or appeal.

S. 675

PROCUREMENT DIVISION

Title III dealing with administrative adjudications would be inapplicable because no law requires that an opportunity for hearing be granted by this Division in connection with any of its activities, other than in personnel matters falling within the further exemption contained in section 301 (e).

Rules and regulations relating to Division activities deal for the most part with matters of internal governmental management-policies and methods of procurement and disposition of Government property by Government agencies and have no regulatory effect upon persons outside the Government service. While it is perfectly proper to publish such rules and regulations for the public's information, there is no reason why the public should participate in their formulation, nor why they should be made subject to judicial review.

On the whole, this bill would not seem to present any undue administrative difficulties in the Procurement Division.

S. 675

GENERAL OBSERVATIONS

Section 103 (c) apparently recognizes a distinction between "ultimate authority" and "agency tribunal."

With respect to the appointment of the Director, there should be added in section 105 (1), page 5, line 8, the words "and consent" after the word "advice," so that the phrase would read "by and with the advice and consent of the Senate." It appears that if the Senate is to participate in such appointment, the customary phrase should be used.

Section 107 (5) relates to the practice of attorneys. It is suggested that each department be permitted to retain the right to proceed against enrollees for misconduct. The reason for this view is that experience shows each department to be more zealous of its own welfare and therefore better able to care for its own interests. Also, the technical legislation in recent years makes discipline of enrollees for technical violations peculiarly within the ambit of the department concerned.

Section 201 (2) provides that all rules, regulations, and procedures, whether formal or informal, shall be made available to the public. In connection with this provision, consideration might be given to excepting such matters as "staff instructions in special individual cases or general instructions respecting

matters of form or internal management or routine." Such an exception is incorporated in section 203 (c) of S. 674, and in section 301 (c) of S. 918.

Section 301 makes the provisions of sections 302 to 309, inclusive, applicable only to proceedings wherein rights, duties, etc., are required by law to be determined after opportunity for hearing and, if a hearing be held, only upon the basis of the record made at such hearing. It would appear that section 310 should also be made applicable only to such proceedings since that section presupposes a hearing and record made before a hearing commissioner.

Section 301 (d) contains a list of specific matters which are excepted from its application. Among such exceptions are "matters concerning the conduct of the Military or Naval Establishments, or the selection or procurement of men or materials for the armed forces of the United States." This exception would undoubtedly apply to the conduct of the Coast Guard and to the procurement of strategic and critical materials by the Procurement Division.

Section 302 (6), providing for suspension of a hearing commissioner without pay until final decision on charges against him might well be amended to provide that upon the filing of formal charges in the Office of Federal Administrative Procedure, he shall not participate in hearings until final decision of his case, which must be rendered within 90 days. Consideration might also be given to the granting of an administrative hearing before at least three hearing commissioners skilled in the subject of his alleged misconduct and with the right of appeal to an appropriate tribunal. Such provisions would work no hardship on the hearing commissioners or the agency and should accomplish the end sought without unnecessary delay.

Section 303(2) of this bill provides that "no case in which the facts are agreed need be presented for hearing before, or consideration by, a hearing commissioner if the agency tribunal otherwise directs." Where the facts are agreed upon, presumably the matter for decision is the construction of laws, rules, or regulations. It appears, therefore, that the hearing commissioner should be authorized to decide the question. A claimant or litigant would frequently accept without appeal the judgment of a hearing commissioner after a full and fair hearing on a question of law. A material percentage of the cases which are appealed to the United States Board of Tax Appeals involve questions of law only. The Office of Administrative Procedure, in its relation to other agencies, would be substantially similar to the relationship between the Board of Tax Appeals and the Bureau of Internal Revenue. Even as many cases end with the Board, so many cases would end with the decision of the hearing commissioner.

Section 304 empowers the hearing commissioner to administer oaths and affirmations, examine witnesses, and receive evidence. This means substantial expenditures for highly paid court stenographers and costly transcripts in all agencies. In many cases after a decision the case would end, and in such cases the transcript would be unnecessary. It seems that some provision should be made with reference to official hearing stenographers, fees for transcripts, when transcripts need not be made, and when made, who shall pay for them. It appears also that provision should be made for witness fees.

No question of constitutionality is presented by Title IV except so far as it provides for judicial review of administrative declaratory rulings. The rule is that the so-called constitutional courts, namely, the district courts and the circuit courts of appeal outside the District of Columbia and the United States Supreme Court, have no jurisdiction to consider a matter which is neither a "case or controversy." If, notwithstanding the care of the draftsmen, an attempt should be made under this bill to obtain judicial review of a declaratory ruling, which merely removes an uncertainty but which does not concern a justiciable matter, difficulty will be encountered outside of the legislative courts i. e., the District Court for the District of Columbia, the Court of Appeals for the District of Columbia, and other purely statutory courts. Legislative courts, it has been held, are not confined to activities which are considered "judicial" but may exercise legislative or administrative powers.

It is noted also that this bill does not contain a separability clause such as that contained in section 112 of S. 674.

S. 674

BUREAU OF INTERNAL REVENUE

See also the letter transmitting this memorandum and Under Secretary of the Treasury Bell's testimony of April 15, 1941, before the subcommittee considering the three administrative-procedure bills.

The definition of "rules" in section 102 (c) appears to be indefinite in application. Among other things, it might include many ruling letters and general instructions to collectors, field agents, and other Bureau personnel. Further questions of construction are presented by the treatment given to rulings by section 212.

The Commissioner and Deputy Commissioners could not physically hear or personally review every taxpayer's case. Nevertheless, section 103 (e) is mandatory and guarantees to the taxpayer such personal hearing or personal review in any case where the Commissioner or a Deputy Commissioner has reviewed or revised the determination of a subordinate. Frequently, the Deputy Commissioner will review or revise a subordinate's determination in a particular case, and thus lay down the rule for disposing of perhaps a hundred, perhaps a thousand, comparable cases.

Section 107 apparently contains a mandatory provision requiring that subpenas shall be issued to private parties as freely as to representatives of the Bureau of Internal Revenue. The Bureau does not have, under existing law, the right to issue subpenas to private parties in tax controversies and believes that there is no reason justifying a statute requiring this radical departure from established practice.

The policy with respect to publicity prescribed by section 108 is clearly out of line with the Bureau policy in regard to the publishing of information relating to taxpayers. Moreover, the exception provided in this section as to "personal data or material which the agency, for good cause and upon statutory authorization, finds should be treated as confidential," does not appear to be broad enough to exclude from the operation of that section information which the Bureau under existing law is not permitted to publicize. Thus, this section would permit publicity of information furnished the Bureau by the taxpayer. Its effect would be, it appears, either the discouragement of the formal proceeding which the bill seeks to encourage, or the breeding of a reluctance on the part of taxpayers to submit information for fear of possible publicity. Voluntary disclosure by taxpayers of confidential information is an important factor in the successful functioning of the revenue system. Therefore, the application of this section to this Bureau would appear to be unwise.

The provisions of section 109 of this bill, which prescribe the duties of the Director of Federal Administrative Procedure, appear to invade the province of the Joint Committee on Internal Revenue Taxation, and to contravene the provisions of section 3790 of the Internal Revenue Code prohibiting administrative review of the Commissioners' decisions except as provided by statute in the Board of Tax Appeals procedure. It is accordingly recommended that all internal-revenue functions be eliminated from the supervision and control of the Office of Federal Administrative Procedure, or that section 109 be amended by adding the following paragraph at the end thereof:

"The foregoing duties of the Office, as applied to all matters or functions concerning internal revenue taxes, shall be limited and confined to purely procedural matters."

The process prescribed by section 111 for suspending the application of particular provisions of the bill is so complex and permits of so many delays and makes the suspensions of such indefinite duration that the practical application of this section to the internal-revenue system is open to some question.

As an indication of the vast number of Bureau rules which are now in full force and effect and which would be subject to the rule-making procedures prescribed by title II of the bill, there follows a partial list of Bureau publications containing rules which implement, complete, or make operative the legislation administered by the Bureau.

Regulation 42. Tax on Telephone, Telegraph, Radio and Cable Facilities, etc. (56 articles).
Regulation 43. Admissions and Dues Taxes (58 articles).
Regulation 44. Excise Taxes on Gasoline; Oil, Wort, Malt, and Grape Products; Matches (46 sections).
Regulation 46. Excise Taxes on Sales by Manufacturer (59 sections).
Regulation 48. Processing Tax on Certain Oil (25 articles).
Regulation 64. Capital Stock Tax (40 articles).
Regulation 71. Stamp Taxes (140 articles).
Regulation 74. Income Tax, 1928 Act (467 pages).
Regulation 77. Income Tax, 1932 Act (423 pages).
Regulation 78. Consolidated Returns, 1932 Act (25 articles).

Regulation 79. Gift Tax (78 articles).
Regulation 80. Estate Tax (121 articles).
Regulation 86. Income Tax, 1934 Act (466 pages).
Regulation 94. Income Tax, 1936 Act (566 pages).
Regulation 95. Unjust Enrichment Taxes (39 articles).
Regulation 96. A. A. A. Refund Claims (35 articles).
Regulation 101. Income Tax, 1938 Act (802 pages).
Regulation 103. Income Tax, Internal Revenue Code (862 pages).
Regulation 104. Consolidated Returns (27 sections).
Internal Revenue Bulletin Service, consisting of weekly bulletins and semiannual cumulative bulletins, containing Treasury decisions (86 issued and published in 1940), Court decisions (77 published in 1940), Chief Counsel's memoranda (approximately 1,132 issued in 1940 of which 53 were published), and office decisions of the Income Tax Unit, Miscellaneous Tax Unit, etc. (approximately 255 issued and published in 1940).

As to the number of rules relating to the organization and procedure of the Bureau, no estimate has been attempted. It may be stated, however, that all such rules which relate to the rights or benefits of a taxpayer are either published or incorporated in substance in the correspondence with a taxpayer to the extent necessary to inform such taxpayer fully of his rights and benefits.

In addition to the very substantial number of Bureau adjudications which are given judicial review by the Board of Tax Appeals (opinions in about 413 cases promulgated in 1940) and the courts under present procedure, there are other cases which might be classified as adjudications, and many other cases which the public would consider as adjudications. Among these are most of the rulings of the Taxpayers' Rulings Section of the Practice and Procedure Division (approximately 16,940 rulings issued in 1940), actions on offers in compromise, and actions on decisions (decisions of the Board of Tax Appeals as to which the Commissioner issued his acquiescence or nonacquiescence on about 501 cases in 1940).

The provisions of section 202 (d) are undesirable in that they would require the Bureau to issue in the form of rules, all interpretations of law, whether or not of general application, currently relied upon by the Bureau and not otherwise published in the form of regulations. A blanket requirement of this kind might be the source of embarrassment to the Bureau in the issuance of future rulings, and under some circumstances might result in schemes of tax avoidance.

Insofar as section 203 (a) provides that legislative provisions contained in regulations shall be stated in italics or quotations, it would seem to be necessary to reprint all Bureau regulations, since these formalities have not been observed in the past, although excerpts from statutes as set forth in such regulations are clearly identified by them.

Section 203 (c) to the extent that it prohibits the disposition of cases upon the basis of rulings not published in the Federal Register, is subject to the same criticism as section 202 (d). In addition, the practical application of the provision for publication of rules prescribed by this section will probably result in the delay of numerous office decisions pending check on prior publication or pending publication of a ruling. At present only the regulations and Treasury decisions are published in the Federal Register, and Chief Counsel's memoranda, office decisions, mimeographs, etc., which are of general application and of public interest are published in the Bureau's Bulletin Service. There are numerous rulings which can be said to be of general application in the sense that they lay down a rule applicable to all taxpayers similarly situated. In practical effect, however, they are not of wide application because they cover the facts of a particular case, although in the course of time they might affect the cases of two or three other taxpayers. It is not practicable to publish all such matters, nor would the change in the present policy produce any additional benefits either to the public or to the Bureau. Many instances arise where the Bureau must act promptly to protect the revenue. For example, cases where jeopardy assessments are necessary, or where the statute of limitations on assessments is about to run against the Government. If this section is enacted, there will be many cases where the Bureau will be prevented from taking prompt action, with consequent loss of revenue.

Section 204 provides that no modification or rescission of a ruling or regulation would be effective until after publication and for 30 days thereafter, unless the agency makes a finding of an emergency requiring the advancement of the effective

date. This trespasses on a field of Internal Revenue practice that has been well worked out over the years, i. e., the legal effect of modification of rulings or regulations. In this field special statutory provisions geared particularly to the exigencies of the revenue service now exist. For example, section 3791 (b) I. R. C., and section 1108 (b) of the Revenue Act of 1926. Undoubtedly some conflicts would result with the enactment of section 204. This section also offers many problems of construction with well tested and carefully worked out revenue laws. It offers also the possibility of freezing erroneous rulings or regulations and preventing their speedy correction. This section, therefore, offers little advantage to the revenue system and wide leverage to taxpayers to impede the orderly administration of the Revenue laws.

Sections 207, 208, and 209 prescribe and so restrict the procedures which may be used in rule making that they would seriously interfere with the orderly and expeditious conduct of the business of the Bureau. The deferring of the effective date of a "rule" would benefit the taxpayer very little, if any, and then only in the very rarest kind of a case. The vast majority of the "rules" issued by the Bureau either interpret the statute or apply the terms of the statute to certain conditions, circumstances, or a set of facts, and, consequently, such rulings clearly relate back to the effective date of the statute. It would seem an absurdity to provide that until an interpretative rule has become effective the Bureau must administer the law without an interpretation. The requirements for general notice, informal, and formal hearings are procedures for rule making which are entirely unsuited to the administrative needs of the Bureau and to the general nature of substantially all the rules promulgated.

While it may be practicable for the Alcohol Tax Unit of the Bureau to comply with the provisions of these sections in the case of revision of rules which do not involve the implementation of new statutes, it does not necessarily follow that the prescribed requirements respecting notice of rule making and public rule-making procedures may be universally applied in the promulgation of rules under the statutes administered by the Unit. Although it has not been the practice of the Unit to publish notice of rule making, this Unit had occasion recently to revise nearly all of its rules and regulations designed to implement and interpret the revenue laws which it administers. The practice followed in accomplishing this revision was to have drafts prepared by office personnel familiar with the subject. These drafts were then reviewed by an office committee of the Unit consisting of the Deputy Commissioner, Chief Counsel, Assistant Chief Counsel, Assistant Deputy Commissioner, and others. After the modifications agreed upon on committee were made galley proofs were obtained and copies thereof furnished industry representatives for comments and suggestions. These comments and suggestions were considered, and, where deemed practicable and permissible, were adopted. The handling of this matter was not essentially different from the types of rule making prescribed by subsections (a) and (b) of section 209. However, the application of such requirements will at times be found to be inappropriate and inapplicable in the case of issuance of regulations necessary to carry out newly enacted provisions of law. Furthermore, subsection (d) of section 209 would effect a change in the procedure followed in hearings held with regard to the promulgation of certain regulations under the Federal Alcohol Administration Act by requiring that adequate opportunity for cross-examination be afforded to all interested parties at such hearings. There seems to be no necessity for this requirement in the case of these hearings. In view of the importance to the Government of promptness and certainty in the collection of its revenues, functions concerning internal-revenue taxes should either be excepted from these provisions of this bill, or such provisions should be simplified and broader discretion given administrative agencies.

Section 210 of the bill grants to all interested persons the right to request any agency to issue, amend, or rescind rules, and requires that reports shall be made to Congress on the nature and disposition of such requests. Thus, there would be imposed on the agency the duty of acting on such requests in precisely the same manner as if it were proposing on its own motion to issue, amend, or rescind its rules, that is by following the formal procedure of public notice and hearings. It is to be observed that the present policy of the Bureau denies to no one the right to request a ruling, and that the present procedure permits of the most efficient and expeditious treatment possible of such requests.

Section 211 authorizing judicial review of any ruling or regulation, either before or after resort to the Bureau, would establish a system under which

the opportunities for judicial review in any given case would be afforded at different stages in the administrative proceedings relating to that case. Although this system of piece-meal judicial review may perhaps be feasible in the case of a regulatory agency, the effects of its application to this Bureau would be little short of disastrous. It would make available to every person having an interest or alleged interest in the subject of the ruling or regulation a means whereby its operation could be unreasonably delayed and prompt collection of the tax forestalled, thus avoiding section 3653 (a), I. R. C., which prohibts the enjoining of tax collections. This would obviously be contrary to the public interest.

The proviso in section 211 (a) to the effect "that controversies as to the applicability of any rule to any person, property, or state of facts shall be determined by the declaratory ruling procedure provided in title III hereof" would require the use of the hearing commissioner procedure in all declaratory judgment proceedings, and furthermore would make the issuance of a declaratory ruling mandatory upon the agency. Section 304 provides that upon the petition of any interested person, every agency shall, in accordance with the provisions of title III, make and issue declaratory rulings, etc. It should be particularly noted that the declaratory ruling procedure provided in title III is incorporated by reference in title II, and therefore, the exceptions specified in title III concerning the application of that title would not be carried into title II. The preliminary discussion of the members of the minority, commencing on page 203 of the Final Report of the Attorney General's Committee on Administrative Procedure, discloses that it was the intention to except all agencies from the operation of title III where its adjudication or determinations were the subject of a trial de novo in a separate agency like the Board of Tax Appeals or in a trial court such as the Court of Claims or the United States District Court. Any declaratory ruling in an income, profits, estate, or gift tax controversy, is subject either to a trial de novo before the Board or to a trial de novo before the Court of Claims or a district court. It appears, therefore, that section 211 (a) should be amended by a further proviso to the effect that the declaratory ruling procedure provided in title III should not apply to an administrative adjudication, determination, or order which was excepted by the provisions of section 301 (a). This might be accomplished by changing the period at the end of section 211 (a) to a semicolon and adding thereafter the following proviso:

"*Provided further*, That the declaratory ruling procedure provided in Title III hereof shall be inapplicable to such controversies as are excepted from the operation of Title III by the provisions of section 301 (a) of said Title."

Section 212 discusses "rulings" and in treatment differentiates them from "rules." The construction of this section is not entirely clear and should be made so. A great many rulings are not of general or wide application and have no place in the regulations. In addition, to make available to "any" person "all" rulings will necessitate a substantial increase in personnel for the sole purpose of preparing for publication all the thousands of rulings issued annually by the Miscellaneous Tax Unit of this Bureau, most of them having no general interest.

The elaborate machinery set up by title III of the bill for the formulation of administrative adjudications, which seeks to segregate all prosecuting from hearing and deciding functions through the appointment of hearing commissioners, is wholly unsuited to the needs of this Bureau. The laws which the Bureau administers all provide full, adequate, and complete remedies under which any taxpayer may avail himself of the right to a judicial review of his case. The Bureau's internal organization is capable and efficient, and its procedures are designed to afford every taxpayer the opportunity of presenting briefs and oral arguments to men of known experience, technical competence, and specialized knowledge. It might be stated in this connection that the technical staff of the Bureau is earning an enviable reputation for the efficient manner in which it is negotiating amicable settlements of controversies. During the fiscal year ending June 30, 1940, the staff closed by stipulations or agreed settlements 3,285 cases, and by stipulation filed pursuant to offers in compromise, 30 cases, while the Board of Tax Appeals closed by dismissal or default 267 cases, and tried on the merits, 1,301 cases. These figures show that of the cases pending on petition for judicial review during that year, 4,883 were closed, of which 3,315, or almost 68 percent, were closed as the result of the efforts of the members of the technical staff. This enviable record suggests that the adoption of an unknown substitute for such an efficient organization and procedure would be a grave mistake.

It is understood that it is not intended to subject to the provisions of title III those operations of the Bureau wherein the taxpayer possesses the procedural remedies of invoking the jurisdiction of the Board of Tax Appeals or of a United States District Court or of the Court of Claims. This is because in such matters the taxpayer already has the ideal remedies of a complete separation of the examining and prosecuting functions of government from the adjudicating functions of government through the medium of trial de novo. However, it appears that the language of section 301 (a) purporting to make such exceptions falls short of such intention. In the first place, the language of section 301 (a) deals with administrative decisions, determinations, or orders. Those are words descriptive of things done or already accomplished. They do not encompass the procedure leading up to the making of an administrative decision, determination, or order. In addition, the words "subject to, or made and issued upon, trial de novo" seem to deal with things done or to be done at the trial de novo itself rather than the administrative procedure within the Bureau leading up to the making of an administrative decision. Under the circumstances, therefore, the language as actually drawn would seem to subject every Bureau adjudication or determination to the hearing commissioner procedure of title III. In order to effectuate the intended result, the language involved should be amended as follows:

"301. Exceptions.—Nothing contained in this Title shall apply to or affect any matter concerning, or relating *or leading* to, *or resulting in*—

"(a) Administrative decisions, determinations, or orders *which may be the subject of* or *which are* made and issued upon, *a* trial de novo by *either a* separate and independent administrative tribunal or any court * * *."

The provisions of this title are apparently intended to apply not only wherein rights are required by law to be determined after opportunity for hearing and upon the basis of the hearing record, but also to other proceedings. The functions and duties of the Alcohol Tax Unit of this Bureau include, among other things, the determination and assessment of taxes on distilled spirits, alcohol, fermented liquors, wines, etc.; the disposition of petitions for the remission of forfeitures; and the disposition of applications for certificates of label approval. The administrative disposition of any such matter would appear to constitute the "adjudication" as defined by section 102 (d) of the bill. The existing procedures for the discharge of these functions have been working efficiently and, it would seem, to the satisfaction of the public.

Section 304 provides for mandatory declaratory rulings and judicial review thereof. This section provides that upon the petition of any interested person, an agency shall make and issue declaratory rulings when necessary to terminate a controversy or remove a substantial uncertainty, which rulings would be subject to the same administrative or judicial review or reconsideration as in the case of all other authorized adjudications of the agency. It is to be observed that the right to petition extends to every published rule which the taxpayer might in self-interest allege involved a substantial uncertainty as to its application to his case. It would seem that the Bureau would be without power or right to deny a petition under section 304, and that, in answer to such a special statutory invitation, such an avalanche of petitions would descend upon the Bureau that its entire personnel could not properly meet the situation even though it were relieved of every other function which it is now required to exercise.

In connection with consideration in the Senate on the revenue bill of 1935, Mr. Harrison, from the Committee on Finance submitted the following report concerning declaratory judgments as to taxes.

"Declaratory Judgments as to Taxes

"Your committee has added an amendment making it clear that the Federal Declaratory Judgments Act of June 14, 1934, has no application to Federal taxes. The application of the Declaratory Judgments Act to taxes would constitute a radical departure from the long-continued policy of Congress (as expressed in Rev. Stat. 3224 and other provisions) with respect to the determination, assessment, and collection of Federal taxes. Your committee believes that the orderly and prompt determination and collection of Federal taxes should not be interfered with by a procedure designed to facilitate the settlement of private controversies, and that existing procedure both in the Board of Tax Appeals and the courts affords ample remedies for the correction of tax errors."

In the Revenue Act of 1938 Congress amended the final closing-agreement provisions (section 3760 of the Internal Revenue Code) by authorizing the making of an agreement in writing with any person relating to the liability of such person in respect of any internal revenue tax for any taxable period. This amendment for the first time authorized final closing agreements respecting internal revenue tax liability for future taxable periods. It has been administered so as to enable taxpayers to secure rulings on hypothetical and unexecuted transactions prior to consummation, followed by a final closing agreement as to their tax effec as, if, and when consummated.

The majority report of the Attorney General's Committee states:

"It is interesting to note that since the development of the prospective closing agreement, the Bureau has liberalized its policy on advance rulings and now issues such rulings with some frequency." Footnote 11, page 31.

"But, contrary to expectations, there has not thus far been a very considerable volume of applications by taxpayers for binding pronouncement by the Bureau. In few cases has the Bureau refused, after request, to issue a ruling upon which a closing agreement could be predicated." Footnote 16, page 32.

"The prospective closing agreement procedure does not insure the taxpayer against changes in the statutes, nor is provision made for judicial review of unfavorable rulings." Footnote 14, page 32.

The majority report also points out that the opportunity to obtain a declaratory ruling might be explointed by interested persons. Innumerable requests for rulings on slightly altered facts might be made in an effort to reach the outermost edge of legal contact without stepping over the boundary into actual illegality. If every applicant for a ruling were to require issuance of a binding declaration, the energies of the administrative agency might be unduly taxed. See page 33.

The provisions of sections 211 and 304 make it mandatory upon every agency to issue a declaratory ruling upon the petition of any interested person, with certain vague limitations impossible of satisfactory ascertainment. The Bureau relies upon the statement of legislative policy announced by the chairman of the Senate Committee on Finance above quoted; particularly, since the enlarged field for final closing agreements, when reasonably and sensibly administered, accomplishes many of the better objectives of a declaratory judgment. It is recognized that the Bureau's administration of the prospective agreement statute has been liberalized; and it may be, too much so. It is submitted as a fixed Bureau policy that it should never advocate or support a tax exemption in perpetuity by contract regardless of the subsequent legislation of Congress. When a prospective agreement is executed, the policy is not to disturb the same even though the regulations be subsequenly changed and even though a United States Supreme Court decision subsequently reveals that the departmental regulation was erroneous. However, no tax position in the future should be put beyond the legislative power of Congress.

The feasibility of the declaratory ruling procedure in the Bureau was recently exhaustively considered by the Treasury Department. The conclusion reached was that a general declaratory ruling procedure was not practicable and that prospective closing agreements afforded the best solution to this problem. Under such circumstances it is obvious that the proposed generalized procedure, which makes no attempt to take into account the special problems and difficulties which the Bureau would encounter in issuing declaraory rulings, would be fatally defective as applied to this Bureau.

A declaratory judgment in favor of the Bureau would have no serious effect on the rights of any person, regardless of whether or not such person was a party to the proceedings. On the other hand, a declaratory judgment in favor of the taxpayer could be applied only in favor of persons who had been made parties to the proceedings, and accordingly, the Bureau would not be required to apply the rule of the declaratory judgment to anyone who might be benefited thereby, and it would be prohibited from applying such rule to persons where such application would result in the showing of a deficiency in tax. It is not unusual for a rule or regulation relating to income-tax matters to operate both for and against the interests of different taxpayers, depending upon the peculiar circumstances present in each case.

The bill places no limitation on the number of petitions which any one person may file or the number of persons who may file petitions at different times, relating to the same rule or provision of law. Thus, one person may secure an unfavorable declaratory judgment under one revenue act, and be entitled to petition for a declaratory judgment with respect to an identical provision of a

subsequent revenue act. In addition it would be possible for the petition of one or more persons to be in the process of judicial review and at the same time to have an identical petition by other persons in the process of the required administrative procedure of public notice and public hearing. There appears to be no limit on the extent to which such duplicate procedures may be carried.

In view of the foregoing, it is strongly recommended that sections 211 and 304 be amended so that they will have no application to Federal taxes.

The provisions of section 306 are most unusual. Experience indicates that it is not administratively desirable to permit in every case that the taxpayer have complete access to the Bureau's files on his case, as would be authorized by this section. This section also would impede the orderly flow of the work since it requires that the taxpayer be notified of his right to inspect the Bureau's file before "informal or tentative decision is made." Every ruling letter proposing to advise a taxpayer of his tax liability on a particular set of facts must, it appears, be held up until the taxpayer has been notified that the Bureau is ready to give him a ruling and that he has the right to inspect the Bureau file and that the ruling is being withheld until he has inspected the file or waived his right to do so. In addition, an applicant for a permit to engage in the liquor business would be enabled, where it is proposed to disapprove the application, to examine in advance of the hearing the evidence on file and build up his defense accordingly. The same thing would apply in the case of a permittee whose permit it is proposed to revoke. These provisions would surely cripple the administration of the permit systems.

Section 309 (g) concerns prehearing conferences and announces the authority of hearing commissioners in what is generally referred to as pretrial procedure. The present powers of the Board of Tax Appeals do not include authority to direct an informal settlement. See sections 1116 and 1141, Internal Revenue Code. This provision, therefore, goes far beyond the pretrial procedure thus far developed and would be in plain opposition to the Internal Revenue Code, wherein it is directed that opportunity to be heard upon any procedure instituted before the Board shall be given to the taxpayer and the Commissioner, with right of judicial review to each. Should the Board be granted authority to effect an informal settlement of a case pending before it over the Commissioner's objection, with the preparation of no formal record and the preservation of no formal right in the Commissioner to seek a review before a circuit court of appeals, then the Commissioner is in the pitiful condition of developing tax law only by indirect litigation; that is, in those cases where the taxpayer sues in court, or seeks appellate review, in decisions adverse to the taxpayer. This would be highly detrimental to the Government's best interests in revenue matters. It would particularly strip the Commissioner's office of its right to direct the course of litigation in any case where the Board or the hearing commissioner saw fit to direct the settlement.

The provisions of section 308 to the effect that reinspections or retests by superior officers are to be provided before formal proceedings may be instituted, in cases where the decision rests upon inspections or tests, would tend to cripple the permit systems of the Alcohol Tax Unit of this Bureau and add needlessly to the expense and burden of administration. Practically all disapprovals of applications for permits and practically all permit revocations are based upon inspections and a considerable number of such proceedings involve tests.

In connection with section 309 prescribing formal hearings, the existing procedures of the Alcohol Tax Unit of this Bureau provide for the holding of formal hearings only where the laws administered by it authorize and require hearings, or provide for the issuance of permits, or the judicial review of administrative decisions. These procedures relate to the permit systems prescribed under sections 2871 and 3114, Internal Revenue Code, and sections 3 and 4 of the Federal Alcohol Administration Act (U. S. C., title 27, secs. 203, 204). Hearings are held under section 2871 in connection with the issuance, denial, and revocation of permits for the manufacture of liquor bottles; under section 3114 in connection with the issuance, denial, amendment, and revocation of industrial alcohol permits; and under section 4 of the Federal Alcohol Administration Act in connection with the issuance, denial, amendment, suspension, revocation, and annulment of permits pertaining to beverage liquors. The procedures under the permit systems meet, in a substantial sense, the general requirements of the bill respecting notice, hearing, decision, and review except that the hearing officer is a permanent appointee of the Treasury Department and is not vested with authority to decide the cases heard by him.

A further objection to section 309 (g) is the provision that there may appear before the hearing commissioner only "the parties or their attorneys." The word "attorneys," as used in the bill, would seem to pertain only to members of the bar. However, in section 104 it is provided that any interested person (and the Commissioner is certainly an interested person in a docketed case) may appear before any agency "in person or by duly authorized representatives." The bar of the Board of Tax Appeals has always embraced accountants as well as attorneys. It would seem that for designated purposes the Commissioner might name his own representatives to appear before the Board and it would be an unwarranted abridgment of the rights of an interested party to place any limitation upon the representatives which the Commissioner might name other than that they be technically proficient to handle the functions to which they are assigned. It is therefore recommended that section 309 (g) be amended by substituting for "attorneys," page 43, line 9, the term "authorized representatives," and by changing the period at the end thereof to a colon and adding thereafter the following proviso:

"*Provided*, That no agency or agency tribunal shall by this subsection be granted any additional powers (including the power to effect informal settlement of cases) which it does not already possess under the law, prior to the enactment of this Act, over the subjects specified herein."

Section 311 (b) might be construed to permit a person who is a stranger to a tax case to secure judicial review of the Bureau's decision.

S. 674

BUREAU OF THE COMPTROLLER OF THE CURRENCY

See also the general discussion, this heading, under S. 675.

Because of the breadth of the definitions in section 102 of the terms "agency," "rules," and "adjudication," practically all of this bill might be held to be applicable to this Bureau, in which event the Bureau's work would be seriously interfered with and impeded.

Section 108 requires that all interested persons be given access to all matters of record of any agency "except personal data or material which the agency, for good cause and upon statutory authorization, finds should be treated as confidential." Most Bureau matters of record pertaining to particular banks could not be made public without seriously endangering the banks and their depositors. Nevertheless, because of the lack of specific statutory authorization, the Comptroller could not make appropriate exceptions and would have to make all "matters of record" public regardless of "good cause" for confidential treatment.

Sections 200 and 202, insofar as they relate to making available to the public statements of policy and internal organization, as well as rules, forms, etc., do not seem to be at much variance with the principles of S. 675. However, it should be noted that S. 674 goes beyond S. 675 in establishing a policy in opposition to the general use of the case-by-case method. The case-by-case method is in the very nature of things the only method suitable with respect to bank supervision.

Sections 205 to 209 contain provisions relating to rule-making procedures. Section 206 would require the Bureau to make necessary preliminary non-public investigations prior to the issuance of rules. Section 208 provides that general notice of proposed rule-making shall be published whenever practicable, and that special notice may be given to particular persons, representative persons, or groups or associations who might be interested in the proposed rule. Section 209, without limiting the adoption of any other procedures, authorizes the utilization of specified types of public rule-making procedures, including the submission and reception of written views, consultation, and conference, informal and formal hearings. These provisions are considered inappropriate for the formulation of rules for use by national-bank examiners, national banks, or their managements. Broad general rules cannot be formulated to any advantage in the field of bank supervision because each situation must be viewed in the light of its special facts and circumstances and prevailing conditions. For example, a ruling (which by virtue of section 212 would be followed by the formulation of a rule or a statement of policy and be published) which would represent an application of sound practical judgment and legal knowledge with respect to a problem arising in connection with small personal loans by banks located in industrial centers, would not be applicable

to a situation involving loans to farmers located in the heart of farming districts. Any rule based upon that ruling would likewise be inapplicable to similar problems arising in different parts of the country. Consequently, the volume of rules formulated on the basis of rulings would be so great as to necessitate a tremendous increase in the staff of the Comptroller's office because practically this would entail the formulation of a rule for every ruling, since every situation must be dealt with on the baiss of its special facts, circumstances, and conditions. Very few situations in the field of banking are identical and could be covered by what might be said to be a general rule or principle.

Section 211 would permit judicial review of any rule upon contest of its application to particular persons or subjects. The effect of this provision if applied to the Comptroller's office would seriously interfere with its functioning. If the Comptroller were to declare a bank insolvent and appoint a receiver, or levy a stock assessment either for the purpose of collecting a double liability or restoring an impairment of capital, the action would be subject to judicial review and all the delays connected therewith, resulting in obvious serious consequences. Similarly, if rulings of the Comptroller's office made in connection with the supervision of going banks, as for instance the requirement that a particular bank charge off a portion of a particular asset, were subjected to judicial review, supervision of national banks would be rendered impotent for all practical purposes.

Section 212 would also require that all rulings shall be made available to any person and specially published or reproduced in leaflet or bound form. The banking business, being an extremely delicate one, cannot be subjected to the same type of administrative action and procedure as might be appropriate for administrative agencies not engaged in the supervision or regulation of banks. To require that all decisions and orders pertaining to the confidential affairs of national banks be made available to the public would be contrary to the best interests of the banks, their depositors, and the Government, and would be squarely in conflict with the teachings of experience in the field of bank supervision.

Title III relating to administrative adjudications and requiring certain procedure with respect to giving public notice and affording an opportunity for hearing and for judicial review, would be applicable to this Bureau. At the present time, the Comptroller disposes of applications for authority to commence the business of banking and applications for the issuance of branch permits in an informal manner and without any formal hearing whatsoever. This bill would require that that procedure be changed, and in lieu thereof, informal or formal hearings be held at which all the evidence pertaining to the quality and character of management, financial condition of the bank, etc., would be heard. There is no occasion for hearings, commissioners, the use of subpenas, or the submission of briefs, in connection with these matters.

A further objection to the provisions of this title is that upon demand of interested persons hearings upon such matters as the granting of charters and branch permits at least would have to be held before hearing commissioners. This would serve to impede seriously the work of this Bureau.

Since the need for administrative procedures such as those proposed in S. 674 does not exist in the field of bank supervision, the activities of this Bureau should be specifically exempted from the operation of that bill.

S. 674

BUREAU OF CUSTOMS

Section 211 provides that any rule may be judicially reviewed except as otherwise specifically required or precluded by law. It is not clear whether the words "may be" are intended to give the courts discretion to decline the judicial review. In certain types of customs matters involving the value of foreign currencies, the courts, including the Supreme Court, have declined to exercise any substantial judicial review. These decisions are believed to be eminently wise, and it would be most unfortunate if they were changed by legislation.

Section 301 (a) would exempt from the operation of title III of a large part of the administrative decisions by the Customs Service. Most matters over which the customs court has jurisdiction would seem to come within this provision since there is a trial de novo in court. With respect to certain

matters, the customs court has limited the scope of its review, e. g., currency conversion, the amount of a bounty as distinguished from existence thereof under section 303 of the Tariff Act, findings under the flexible tariff provisions of section 336 of the Tariff Act. There may be a limited judicial review of certain other customs matters, e. g., informers' claims, under section 619 of the Tariff Act. There would seem to be a trial de novo within the meaning of this section in cases of seizure and condemnation under sections 607 to 615 of the Tariff Act. With respect to some matters, there is no judicial review whatever, e. g., allowances under section 563 (a) of the Tariff Act, and disposition of petitions for remission or mitigation under section 618. It appears, therefore, that customs is not entirely exempted from title III by virtue of section 301 (a).

Sections 204 to 211, inclusive, contain provisions relating to the formulation, whether that term includes revenues-collecting operations of this Bureau.

S. 674

PROCUREMENT DIVISION

Sections 204 to 211, inclusive, contain provisions relating to the formulation, rescission, and judicial review of rules which would be inappropriate as applied to rules and regulations issued by this Division or by the Secretary of the Treasury in connection with its activities. As stated above, this Division's rules are for the most part devoted to internal management.

S. 674

BUREAU OF NARCOTICS

Section 108 requires that all matters or record be made available to all interested persons. Thus, the investigation and prosecution of narcotic cases against doctors and druggists, for instance, would be severely prejudiced. The attorney for a physician who has been reported for serious narcotic violations may be permitted to see the report submitted by investigating officers, and thereby learn all about the Government's case before it is presented for prosecution. The exceptions do not seem to afford protection against such a fishing expedition because the information cannot be considered mere personal data, nor is it required by a statute to be treated as confidential.

Section 202 (b) requires that general policies upon which the agency acts shall be formulated, stated, published, and revised in the same manner as other rules, and section 203 (c) prohibits an agency from acting upon unpublished statements of policy. From the standpoint of this Bureau, it will be difficult to determine just what constitutes general policies and to formulate each general policy as a rule. For instance, in considering petitions for remission of the forfeiture of an automobile seized on account of a narcotic irregularity, there are certain conditions which must be satisfied, but there must be some elasticity permitted to take care of unusual cases, depending upon the merits of a particular case.

Subsection (d) of section 202, providing for interpretative rules is objectionable to this Bureau because of the fact that the statutes administered by it are essentially criminal. For instance, the Bureau might be called upon to interpret the phrase "in the course of professional practice only," as used in the Harrison Narcotic Act. The Federal courts have refrained from attempting to give a complete interpretation of this phrase, but have limited themselves to what is not professional practice. An administrative agency should not be required to go further in this respect.

Section 208, requiring notice of rule making, and section 209, prescribing the procedure therefor, will seriously delay the promulgation of necessary regulations under the narcotic laws. It would be necessary to observe this rather complicated procedure even in the case of an amendment of a single article, which, while of general application, will most likely be unobjectionable to the overwhelming majority of persons affected.

Section 304 requiring declaratory rulings should not be made applicable to this Bureau, because it should not be required to interpret a phrase which may be applied in a criminal case where the courts have not passed upon the meaning of the particular phrase. The Bureau has been asked at times to explain what is meant by the phrase "personal attendance" as used in the Harrison

Narcotic Act, because a doctor is excused from keeping records when in attendance upon his patients. The Bureau has persistently refused to interpret this phrase in the absence of its general affirmative interpretation by the courts.

Section 306 is objectionable to the Bureau because it would give access to the file or information upon which the Bureau proposed to act or has acted. This would apply to the record of the report of a criminal violation against a person who may petition the Bureau to close his case or compromise the same, merely for the purpose of getting a preview of the Government's case.

S. 674

COAST GUARD

Generally speaking, the provisions of this bill would not lend themselves to the limited rule-making and adjudication powers of the Coast Guard. Among the functions exercised by the Coast Guard which affect the public in the order of their importance are the following:

Aids to navigation.
Saving of life and property.
North Atlantic passenger routes.
Tort claims.
Contracts for construction.
Whaling.
Remission or mitigation of penalties.
Award of lifesaving medals.
Compilation of statistics of marine disasters.

The Coast Guard issues rules and regulations covering these subjects. They are issued primarily for the information and guidance of the public. They either permit or prohibit certain things to be or not to be done, and do not give rise to issues or disputes between the public and the Coast Guard. It would appear, therefore, to be more expedient and in the interest of good administration not to subject these procedures to the provisions of this bill.

S. 674

COMMITTEE ON ENROLLMENT AND DISBARMENT

Section 105 (c) proposes the same method of admission to practice as is now in effect in the Department. However, the provision is defective in that it does not require a professional man to be authorized to practice his profession in the jurisdiction where he maintains his office and conducts his practice. Many persons have been disbarred by the Treasury Department and other departments and agencies of the Government. This subsection, however, would restore all these persons to the right to practice before the departments unless they had also been disbarred by the highest court of the State and by every Federal court to which they were admitted. Likewise, there would be nothing to prevent attorneys, who have become more or less disreputable in the jurisdictions which originally admitted them to practice, from moving into other jurisdictions and confining their practice to that before the Federal departments, since it would not be possible for them to be admitted in the new jurisdictions by reason of their past records.

S. 674

FOREIGN FUNDS CONTROL—GOLD, SILVER, ETC.

Section 108 provides that all matters of record are to be made available to all interested persons except for (1) personal data, and (2) material which "for good cause and upon statutory authorization" the agency deems should be confidential. Clearly the whole administration of Foreign Funds Control would be seriously prejudiced by such requirement and it is also believed that the administration of the gold laws, especially in its criminal aspects, would be prejudiced by any requirement that such matters be divulged.

Section 203, which appears to be mandatory, provides that "no agency shall act upon unpublished rules, instructions, or statements of policy" (except as

to internal management, etc.). A strong adherence to this provision would seriously hamper the operation of Foreign Funds Control.

Section 211, which provides for judicial review of rules, provides an easy method of forcing litigation of rulings, regulations, etc., and in an agency such as Foreign Funds Control, where such rulings and regulations are very numerous and constantly subject to change, such an encouragement to litigation might prove extremely vexatious and add greatly to the already heavy burdens of the Control.

Section 212 would likewise appear to be of concern to Foreign Funds Control since it requires that where rulings in specific cases which enunciate general rules or principles otherwise not published as rules or statutes, prompt publicity must be given to such rulings through the formulation of general rules or statements of policy. The making of rulings in specific cases is obviously a field in which it is not desirable for the administration of Foreign Funds Control to receive publicity.

S. 674

GENERAL OBSERVATIONS

Section 105 relates to the practice of agents before the departments. If subsection (c) thereof should be enacted in its present form, it would be mandatory on all Federal departments and agencies to recognize any attorney who had ever been admitted to practice in the highest court of his State or in any Federal court. The Treasury Department at present requires that an attorney at law be authorized to practice law in the jurisdiction in which he maintains his office and conducts his practice at the time of making his application for admission to practice before the Treasury Department. Many persons have been disbarred by the Treasury Department and other departments of the Government. This provision, however, would restore to all of these persons the right to practice before Federal departments unless they had also been disbarred by the highest court of the State and by every Federal court which had admitted them to practice. Likewise, there would be nothing to prevent attorneys who had become more or less disreputable in the jurisdiction which originally admitted them to practice, from moving into other jurisdictions and confining their practice to that before Federal departments since it would not be possible for them to be admitted in the new jurisdictions by reason of their past records.

The provisions of section 111 authorizing the President to suspend the application of mandatory provisions of the bill to any particular part of any function or operation of any agency, upon finding that such application would be unworkable or impracticable, seem unduly cumbersome and also to make for serious uncertainty. At least so far as present agencies or functions are concerned, it would appear highly desirable to obtain appropriate limitations upon the scope of the bill prior to its enactment, rather than to await the unpredictable results of this suspension procedure.

The provision of section 203 (c) that no agency "shall act upon unpublished rules, instructions, or statements of policy," with limited exceptions as to internal matters, seems particularly dangerous. There will always be innumerable questions requiring the exercise of judgment as to whether a particular agency's policies, interpretations, and requirements are of such nature to necessitate publication. Many of such questions will be arguable, and to provide that no agency shall act upon unpublished rules, instructions, or statements of policy would invite argument and would imperil administrative action taken in good faith on the supposition that particular rules, instructions, or statements of policy were not of such nature as to require publication, since such a provision would nullify action so taken in the event of a decision that the rule, instruction, or statement of policy involved should have been published. The only means of protecting themselves which would be open to Government agencels would, therefore, be to release for publication a great mass of material, much of which would be without interest to the public.

Section 211 provides that any rule may be judicially reviewed except as otherwise specifically required or precluded by law. It is not clear whether the words "may be" are intended to give the courts discretion to decline judicial review. In certain types of customs matters involving the value of foreign currencies, the courts, including the Supreme Court, have declined to exercise any substantial judicial review.

Section 211 (a) allows declaratory judgments involving the alleged violation of constitutional or statutory rights. Such judgments may be rendered without prior resort to the agency which promulgated the rule. This provision seems unjustifiable since it involves the cardinal principle that administrative remedies should be exhausted before resort to the courts. On the other hand, the provision at the end of section 211 (b) seems to go too far the other way in requiring the court to refer certain cases back to the agency.

Section 301 (f) exempts fiscal operations of the Treasury. It is not clear whether that term includes revenue collecting operations, banking operations, public-debt operations, etc.

Section 309 provides for "a complete segregation of prosecution from hearing and deciding functions." This section contains mandatory provisions that the presiding officers at hearings shall not consult either employees of the agency or interested private persons, and that they shall be governed by the accepted canons of judicial ethics. Such provisions appear desirable if made directory, but might prove too rigid and extreme as general mandatory provisions.

S. 918

BUREAU OF INTERNAL REVENUE (ALCOHOL TAX UNIT)

Section 900 (h) of the bill provides that "Nothing contained in this act shall apply to or affect any matter concerning or relating to * * *. (h) Functions concerning internal revenue taxes or customs duties."

While the functions of the Alcohol Tax Unit of this Bureau relate mainly to the enforcement of internal revenue tax laws, and to that extent would not be affected by this bill if passed, other functions of the unit may be affected by the bill's provisions, depending upon the interpretation to be given to the phrase "functions concerning internal revenue taxes."

The Alcohol Tax Unit is charged with administering the provisions of the Liquor Enforcement Act of 1936, which has to do with the enforcement of the twenty-first amendment. Clearly this act has no relation to internal revenue taxes, and therefore the proposed bill would be applicable to its enforcement. However, in view of the fact that the Liquor Enforcement Act of 1936 is not of such nature as to require the adoption of regulations to make its provisions effective, and no provision is made for the settlement of "controversies" with violators through compromise, or the institution of any formal hearing proceedings of an administrative nature, which might be the subject of judicial review, the passage of S. 918 would have no practical effect upon its enforcement.

The primary question as to the scope of the bill, as applied to Alcohol Tax Unit functions, arises under the provisions of Federal Alcohol Administration Act. The Alcohol Tax Unit has been charged with enforcing this act since the abolition of the Federal Alcohol Administration under Reorganization Plan No. III in June 1940. Considering that "functions concerning internal revenue taxes" are proposed to be exempted from this bill, it is pertinent to consider the status of the Federal Alcohol Administration Act as it relates to internal revenue taxes. The essence of this act is the basic permit system, pursuant to which all alcoholic beverage producers except brewers, and all importers and wholesale distributors are required to qualify as permit holders as a condition precedent to commencement of business. Permits are revocable for violation of their terms and conditions, some of which relate to compliance with internal revenue laws, and others of which have no application to such laws.

The statute appears to be divisible into three parts: First, it is a consumer statute insofar as are concerned those provisions which relate to the adoption and enforcement of labeling and advertising regulations, to adequately inform the consumer as to the quality and characteristics of the product, and to prevent deception of the consumer through false or misleading labeling or advertising matter; second, it is a fair trade statute insofar as are concerned those provisions which outlaw as unfair trade practices, within certain jurisdictional limitations, the creation of tied-house relationships with retailers, exclusive outlets, consignment sales, and commercial bribery; and third, it is a statute relating to internal revenue tax functions insofar as it provides (a) that no basic permit shall be issued to an applicant who has been convicted within 3 years prior to the date of application of a misdemeanor "under any Federal law relating to liquor, including the taxation thereof"; (b) that all basic permits shall be conditioned, among other things, upon compliance with all Federal laws "relating to distilled

spirits, wine, and malt beverages, including taxes with respect thereto," and (c) that one of the purposes of the act, as set out in its preamble, is "to further protect the revenue derived from distilled spirits, wine, and malt beverages."

It is pertinent to observe, in connection with the permit provisions of the Federal Alcohol Administration Act, that the right of a producer, wholesaler, or importer to engage in business as such may be terminated solely on account of violations of internal-revenue laws. The termination of the right to do business in such cases would constitute a penalty for violating internal revenue laws. Consequently, the function of revoking the permit in such cases would constitute a "function concerning internal-revenue taxes."

This analysis of the Federal Alcohol Administration Act illustrates the necessity of clarifying the intended scope of S. 918, as it applies to functions exercised by the Alcohol Tax Unit. Obviously it would not be feasible, in administering the provisions of the Federal Alcohol Administration Act, to apply one procedure in cases where permits are being denied, suspended, or revoked on account of revenue violations, and a different procedure where permits are being denied or proceeded against on account of violations of laws or regulations which have no relations to revenue. The bill should be made applicable in all circumstances or not at all. In view of the fact that the Federal Alcohol Administration Act has been deemed to relate so closely to the tax-collecting functions of the Alcohol Tax Unit as to warrant the vesting of jurisdiction to enforce such act in the Alcohol Tax Unit, it would seem appropriate to avoid conflicting procedures by excepting from the bill not only "functions concerning internal-revenue taxes," but all functions of the Internal Revenue Bureau.

The Alcohol Tax Unit is charged with administering not only the permit system established under the Federal Alcohol Administration Act, which is applicable to the beverage liquor field, but also a separate and distinct basic permit system covering industrial alcohol and denatured alcohol production, distribution, and use under internal-revenue laws. If the purpose of S. 918 is to attain uniformity of administrative procedure in rule making, and in the settlement of controversies arising from the denial, suspension, or revocation of licenses or permits, such purpose would not be attained in respect to the activities of the Alcohol Tax Unit if the provisions of S. 918 were made applicable to proceedings under the Federal Alcohol Administration Act and inapplicable to proceedings under internal-revenue laws. Two separate modes of prescribing regulations would continue to exist, as well as dual procedures in the conduct of hearings incidental to the administration of the two separate permit systems.

Assuming that the bill, if enacted, would be made applicable to the enforcement of the Federal Alcohol Administration Act, the following observations upon the substantive provisions of the bill would appear to be pertinent.

Section 302 (c) of the proposed bill appears to contemplate that within 1 year after the approval of any statute all needful regulations to carry out the purpose of the statute shall have been promulgated. If it is the purpose of this section to curtail the rule-making powers under any statute after the lapse of 1 year, its merits should be carefully weighed. The power to issue regulations should be a continuing power in order that, under changed conditions, regulations once prescribed may be strengthened or relaxed, as circumstances require. In the regulation of labeling and advertising under the Federal Alcohol Administration Act experience has indicated the necessity of frequent public hearings upon proposals to strengthen or relax existing regulations in the interest of consumer protection, or fair trade.

The Federal Alcohol Administration Act at present contains no provision for judicial review of regulation prescribed after public hearing. Under the proposed bill, if held applicable, the right would be afforded any interested party to contest the validity of a regulation in a declaratory judgment proceeding in the United States District Court. Section 400 (b) of the bill departs radically from precedent in respect to the court's power to review the action of administrative officers. This is noticeable in two respects: First, in a declaratory judgment action to test the validity of a regulation the district court could determine whether the administrative department, upon the formal record of public hearings, properly exercised its "discretion," and second, the court would be empowered in such proceedings, where questions of fact arose, to take evidence. There would seem to be no sound reason for disturbing the present generally accepted practice of the district court, upon review of administrative action, to concern itself only with the question, upon the record made before the administrative board, as to whether the action was unsupported by evidence, or arbitrary or capricious.

In the formulation of rules to carry out the intent of a statute, the way should not be left open for district courts, in declaratory judgment proceedings, to substitute their views and opinions as to the propriety of a regulation for those of the agency charged with administering the act. It is pertinent to observe in this connection that an act such as the Federal Alcohol Administration Act, which requires the promulgation of regualtions on labeling and advertising for consumer protection, may be nullified if every regulation promulgated after public hearing must be adequately supported by testimony adduced in the formal record of the public hearing. Under a consumer statute, where notice of a public hearing on a proposed regulation is given, it often attracts no consumer testimony, with the result that the record of the hearing is comprised of the views, pro and con, of members of the industry whose conduct is to be regulated, and whose interests may well conflict with those of the consuming public. Seldom has any "consumer testimony" been attracted to public hearings, upon regulations proposed to be adopted under the Federal Alcohol Administration Act. It should be the purpose of a public hearing on regulations to afford interested parties opportunity to express their opinions in advance of adoption, and to give the regulatory body the benefit of all available information on the subject. The regulations' validity, however, should be measured by the standards laid down in the act of Congress under which it is prescribed, rather than by public expressions of accord or disagreement voiced by those who are to be regulated.

It is proposed in section 600 of the bill that any compromise settlement of a controversy must be approved by the highest authority of the agency concerned and the facts with respect thereto must be incorporated in the annual report of the agency. The authority to compromise violations of the Federal Alcohol Administration Act at the present time is vested in the Deputy Commissioner of Internal Revenue in charge of the Alcohol Tax Unit. Under the proposed bill, if enacted, these matters which are usually of minor importance would require the personal attention of the Secretary of the Treasury. It would also be necessary to embody in the Treasury Department's annual report considerable information of an inconsequential character.

Section 708 of the bill, which has to do with the appointment of hearing officers in proceedings conducted outside of the District of Columbia, and which also prescribes that the hearing in all cases shall be held in the vicinity of the place where the respondent resides or has his principal place of business, could not be applied to Alcohol Tax Unit procedure without impairing efficiency of operations. So far as the Alcohol Tax Unit is concerned, all formal hearings of an adversary nature are conducted outside the District of Columbia, under the jurisdiction of district supervisors in charge of the 15 field offices scattered throughout the United States. Each district supervisor has legal advice available to him and personnel is supplied and available to act as hearing officers in any proceedings which may arise within the district. Were Congress to provide for the appointment, by district judges, of practicing attorneys to act as hearing officers in individual cases it would involve dispensing with some of the functions now performed by district supervisors, and the performance of such functions at greater expense, and probably with more inconvenience to the parties involved, than under the existing procedure. It is not considered that the according of opportunity for fair and impartial hearings in permit proceedings necessitates any such radical departure from the existing procedure. Hearings are presently conducted under a procedure developed, in the case of industrial alcohol, over a period of many years dating back to 1900. The record of the hearing is stenographically transcribed and the parties, if aggrieved, are accorded opportunity under existing law to have the action reviewed in the courts.

The procedure outlined in title VIII of the bill for judicial review of administrative action by the filing of petitions in the Circuit Court of Appeals conforms to the procedure now prescribed under the Federal Alcohol Administration Act for the review of proceedings involving the disapproval of applications for permits, or the suspension, revocation, and annulment of permits. However, section 805 of the bill, which appears to vest in the courts the power to interfere with the exercise of administrative "discretion," is subject to the same criticisms as section 400, heretofore commented on.

Furthermore, the broad language of the bill would appear to modify some of the requirements for review in the Circuit Court of Appeals already established in the Federal Alcohol Administration Act. Under the existing statute, no objection to the administrative order can be urged unless it was previously

urged before the administrative head or unless there were reasonable grounds for failure to do so. Further, the administrative findings on the facts are presently made conclusive if supported by substantial evidence; and, if it is necessary to take additional evidence, the evidence must be referred back to the administrative head for his findings thereon.

S. 918

BUREAU OF THE COMPTROLLER OF THE CURRENCY

See also the general discussion, this heading, under S. 675.

This bill contains all the undesirable features of S. 674, and is, from the standpoint of this Bureau, subject to the same objections.

Section 302 (c) requires that each agency shall "as rapidly as deemed practicable, and within 1 year after the date of approval of any statute hereinafter enacted, issue all rules specifically authorized or required by such statute in order to implement, complete, or make operative particular legislative provisions, including all rules necessary or appropriate to interpret the statute under which the agency operates." Insofar as this Bureau is concerned, this provision is highly objectionable since it is easy to imagine a statute granting the Comptroller authority to issue regulations with respect to investment securities, for example, which cannot possibly be fully construed in a manner suitable to all possible facts and situations within the period allowed. New statutes may well require hearings and study which would consume much more time than 1 year.

Section 303 provides that rules can be issued only after public notice, and public hearing if requested. Although it is difficult to determine what rulings, orders, advisory opinions, regulations, etc., issued by this Bureau in connection with the supervision of a national bank, or the liquidation of an insolvent national bank, would fall within the meaning of the term "rules," it appears that to the extent that they do fall within that definition, the work of the Bureau would be seriously impeded. Rules interpreting the provisions of the National Bank Act, for example, for the use and guidance of examiners and banks, should not be delayed by the necessity of giving notice and holding a public hearing, because they are designed in the ordinary course of events to take care of specific existing situations, and furthermore, the subject matter of such rules would in many cases be too technical to render public hearings advantageous.

Title VI (secs. 600-602) relating to informal administrative settlements is especially inappropriate in the case of this Bureau. Each month there are thousands of claims asserted both by and against the Comptroller or his receivers in connection with bank liquidations. Thus, every such claim which was settled on a compromise basis would have to be "approved by the highest and ultimate authority of the agency * * * and the facts with respect thereto * * * stated in the annual report of the agency making such compromise settlement." It is doubted that Congress would desire to receive a report covering thousands of compromise settlements of claims, many involving only a few dollars. Furthermore, it would serve no good purpose to publicize such settlements because they are practically always based upon the lack of financial responsibility of the obligor. Section 601 would require that in the case of every such compromise settlement, every person involved must be given access to the Bureau's files on the case. This would also be true with respect to controversies arising in connection with the supervision of going banks. Thus, practically every piece of information, rumor, or supposition which is received by the Comptroller and considered in arriving at decisions, would have to be made available to interested persons. This would not only constitute a potential source of great danger to national banks and annoyance and violation of privacy to thousands of individuals, but would seriously hamper the work of this Bureau.

Section 708 would seem to require that in formal administrative proceedings hearings be held at the place where the person affected resides or has his principal place of business and that the presiding officer be "a lawyer learned in the law and agreeable to the lawyers for all parties concerned." There is absolutely no reason for holding formal hearings in connection with the supervision of national banks or the liquidation of insolvent national banks. In addition, this bill would permit the hearings to be presided over by one who under ordinary circumstances would not have the training, knowledge, experience, or Nation-wide viewpoint necessary to enable him to arrive at a sound decision. In chartering banks or issuing branch permits, it is necessary that the Comptroller bear in mind

the general economic conditions of the Nation as well as of the specific community in which the new bank or branch is to be located. It is essential that his judgment in specific cases be predicated upon a knowledge of general banking conditions throughout the country, for otherwise the result would be to create an overbanked condition with serious consequences to the banking structure of the Nation.

The primary function imposed upon this Bureau by the national banking laws (and related statutes) is to exercise visitorial power over national banks as Federal instrumentalities for the purposes, inter alia, of protecting the members of the general public in their dealings with the national banks, and for the protection of the Federal Government in its dealings with such banks as depositaries for or as financial agents of the Federal Government. With a few comparatively minor exceptions, in connection with the chartering of new banks, consolidations of banks, and establishment of claims against the banks in receivership liquidations, the members of the general public have no claims against nor controversies with this Bureau. The impact is not between members of the public and the Bureau, but between the general public and the various national banks in which their deposits are made, and with whom they deal directly, whereas the primary objective sought to be accomplished by these bills by hearings, commissioners, the formulation and publication of rules, decisions, etc., is to afford procedural remedies to members of the public having claims against or controversies with the various bureaus and agencies with which they deal directly.

Accordingly, any interference with existing procedures which have been followed by this Bureau for over 75 years would seriously impair its effectiveness and jeopardize the interests of the public, as well as the interests of the Government. It is believed that when this bill and S. 674 are read in the light of an understanding of the manner in which this Bureau functions, it will not be difficult to establish that the administrative procedures therein proposed are inappropriate for application to it.

S. 918

BUREAU OF CUSTOMS

Section 900 (d) exempts from the operation of the whole act fiscal operations of the Treasury. As pointed out, there seems to be some doubt whether the term "fiscal" would include revenue-collecting operations. In any event, section 900 (h) exempts functions concerning internal-revenue taxes or customs duties. Thus, most of the functions of the Customs Service are clearly exempted from the operation of the entire act, except to the extent that the act may be considered advisory. However, it might be argued that many of the normal functions of customs are not concerned with customs duties, e. g., the exclusion of prohibited articles, such as obscene articles, prison-made goods, narcotics, etc. In addition, the Customs Service performs numerous functions in connection with the present emergency, such as export control, movements of ships, enforcement of the Neutrality Act, etc. Many of these functions are performed by collectors as agents of other departments.

S. 918

PROCUREMENT DIVISION

In view of the exception in section 900 (f), nothing in title III and title IV of the bill on the subjects of administrative rules and judicial review of rules, respectively, would affect the present functions of this Division. For the same reason, Title II, Representation Before Agencies, Title V, Investigations and Subpenas, and Title VII, Formal Administrative Proceedings, would affect only those activities of the Division relating to controversies arising under contracts and agreements for the procurement or disposition of property.

The important effects of the bill upon the work of the Division would result from titles VI, VII, and VIII. These effects would be: First, to enjoin the informal settlement of controversies arising under contracts wherever possible; second, to require formal administrative hearings and decisions where informal procedures do not result in consent dispositions of such controversies, or in decisions acceptable to the person involved; and third, to entitle the person involved to judicial review of final decisions reached through formal administrative proceedings.

Section 601 contains two provisions which are highly objectionable. The first is the requirement for a full disclosure of administrative files and records without reservation as to documents of a confidential or purely intraoffice nature. Such a requirement would be unfair both to the Government and to Government employees who would not have a corresponding right to delve into the files of contractors. It would also adversely affect the character of reports, memoranda, etc., prepared after the enactment of the legislation. Second, and somewhat related to this, is the requirement for full disclosure of the names and identity of all persons appearing against a party to the informal settlement procedure, as well as a full disclosure of the available text or reports of their testimony and recommendations. Such a requirement would subject Government employees and others to possible liability for libel or slander.

Title VII apparently does not itself contain any provision requiring formal administrative hearings and decisions, and apparently comes into application under section 602 of title VI whenever a controversy is not disposed of by informal settlement. This would mean that persons entering into contracts with the Division would be entitled to invoke the formal settlement procedure whenever the informal procedure does not dispose of controversies arising under contracts. So far as present contract provisions and present statutes are concerned, there is nothing which gives to Government contractors any right to hearings on any question in connection with the determination of disputes arising under contracts. To extend formal administrative processes to the field of the Government's contractural relations would in reality place Government contracts in a unique category as compared with contracts in the business world in general. These provisions would prevent any effective action on the part of contracting agencies until a final decision is reached in any controversy under a contract. It would afford to unscrupulous contractors every opportunity to defer actual performance of their contracts through raising endless controversies, trivial or otherwise, thereby, invoking the formal hearing procedure; and genuine contoversies would afford the same opportunity to other contractors in cases where it may be advantageous to them to defer performance until a decision is reached. Such provisions would therefore nullify the standard contract provision that in the event of disputes contractors shall diligently proceed with performance pending final decision, a requirement of the utmost importance for the prompt satisfaction of the Government's needs for work or supplies, and one of particular importance in times of national emergency such as the present.

Section 707 presents additional problems. This section provides that penalties, recoveries, denials, conditions, and prohibitions shall not be imposed, exercised, or demanded beyond those expressly authorized by statute and that no sanctions not expressly authorized by statute shall be imposed by any agency. Except for statutes such as the Walsh-Healey Act, the amended Bacon-Davis Act, the so-called Buy American Act, etc., dealing with specific labor and other policies, there are no statutes which specify the penalties, recoveries, etc., which may be prescribed by Government contracts. The effect of this section, therefore, would be to deny the Government agencies in the first instance any authority to utilize effective provisions for the enforcement of contracts, as for example, provisions for termination of the contractor's right to proceed in the event of default, or for the assessment of liquidated damages for delays.

Section 708 relating to the place of holding hearings would greatly increase the administrative expense of agencies having contracts with persons throughout the country, and would hamper their operations by withdrawing from Washington for lengthy periods both evidentiary records and witnesses. While it is true that contractors suing in the Court of Claims or in the district courts of the United States may now ordinarily secure hearings at or near the places where they are located, such cases are comparatively limited and do not cause the great inconvenience that would result from a flood of formal administrative proceedings.

Section 708 (a) relating to the appointment of lawyers to act as presiding officers at formal hearings outside of the District of Columbia, would be doubly unfortunate with respect to public contracts since there is no reason why controversies under public contracts should be subject to formal hearing procedures. Questions as to the interpretation of specifications, as to whether performance is satisfactory, and the like, are the commonest questions arising under public contracts, and to submit these questions for decision to lawyers learned in the law would be unwise.

S. 918

BUREAU OF NARCOTICS

Section 1 (12) makes matters of record available to all interested persons. This would permit a complainant to obtain a preview of the report made against him in a criminal case which would be wholly improper.

Section 303 requiring notice, hearings, etc., before the promulgation of regulations would be very cumbersome and productive of delay insofar as Narcotic Bureau regulations are concerned. Both the Bureau of Internal Revenue and the Bureau of Narcotics pass upon regulations issued under the internal revenue, narcotic and marihuana laws, and such regulations are approved by the Secretary of the Treasury before becoming effective. Such preliminary procedure could not, therefore, be very well applied to the issuance of these regulations.

The access of private persons to official records, as authorized by section 601, would not be appropriate in the case of reports of criminal violations.

In view of section 900 (h) of title IX, wherein it is stated that nothing contained in the act is to apply to or affect any matter concerning or relating to functions concerning internal-revenue taxes or customs duties, and the fact that the Bureau of Narcotics is engaged in the investigation, detection, and prevention of violations of the Federal narcotic and marihuana tax laws, which relate to internal-revenue matters, it appears that this bill would not apply to regulations or adjudications of this Bureau made under those laws. This exception would not, of course, affect regulations or adjudications made under the Narcotic Drugs Import and Export Act.

S. 918

COMMITTEE ON ENROLLMENT AND DISBARMENT

The language of section 200 seems to permit a layman to appear before an agency in a representative capacity if the proceeding involves a question of law, but does not involve the preparation of a record which may be the basis for judicial review. It seems that if either of the two mentioned situations is present, a layman should not be permitted to act in a representative capacity. This could be accomplished by changing the conjunctive "and" to disjunctive "or."

Section 202 provides that in cases where a lawyer has been guilty of misconduct, the agency may certify the fact to the State which granted him a license to practice, with a suggestion for disciplinary action. The United States attorney is authorized to intervene in any proceedings. This procedure would be cumbersome, would result in interminable delay, and would bring about unsatisfactory results. Local courts and lawyers are indifferent to departmental grievances. There are also many other favorable factors for the lawyer so charged. Local lawyers are loath to prosecute their fellow practitioners.

Section 203 denies recognition to anyone but lawyers in matters involving questions of law and preparation of a record which may be the basis for judicial review. Here again, it seems that "and" should be changed to "or."

S. 918

GENERAL OBSERVATIONS

Section 1 (12) provides that matters of record are to be made available to all interested persons. This would permit the complainant to obtain a preview of the report made against him in a criminal case which would be wholly improper. The exceptions do not appear to take care of such a situation.

Section 202, prescribing the procedure for taking disciplinary action in the event of misconduct of a lawyer, would produce unsatisfactory results. Local courts and lawyers are indifferent to departmental grievances and are loath to prosecute their fellow practitioners.

Section 203 denies recognition to anyone but lawyers in matters involving questions of law and the preparation of a record which may be the basis of judicial review. Here again, "and" should be changed to "or."

Section 302 (c) contains a mandatory provision that "all rules" to make operative statutory provisions must be issued within 1 year after the enactment of the statute. This provision, unless interpreted so loosely as to make

it almost meaningless, is impracticable because it is impossible to foresee at the time a statute is enacted or within 1 year thereafter all the situations which may arise requiring the issuance of rules. An attempt to comply with it literally would result in the issuance of innumerable rules to govern situations which theoretically could arise, but in fact may never do so.

With respect to section 400 (a), the requirement that a request for administrative action must precede a petition in court is a good one, but the 30-day limitation upon administrative action is too arbitrary, since the necessary time will vary with the circumstances. Section 400 (b) (2) permitting review of "the propriety of interpretative and implementing rules" would seem to take the discretion away from the agency involved and to put it in the courts.

Section 600 suggests a question whether its provisions would extend authority to settle and compromise controversies, and as to the effect of such provisions upon the authority of the Secretary of the Treasury to compromise claims in favor of the United States under United States Code, title 31, section 194, and the authority of the General Accounting Office to settle and adjust all claims for or against the Government under United States Code, title 31, section 71, and similar authorities under other special statutes.

Section 602, granting the broad right to demand formal hearings, would cause excessive delay in the administrative process and would considerably increase administrative expenses, inasmuch as it would involve the expenses incidental to formal records and appearance of witnesses.

Subsections (a) and (b) of section 708, authorizing the appointment of lawyers of not less than 10 years' practice to act as presiding officers at formal hearings held outside the District of Columbia, appear to be unwise. Such proposal would deprive the proceedings of one of the fundamental advantages of the administrative tribunal—that of having as the presiding and deciding officer a person experienced in the specialized field involved in the proceeding.

Section 900 (d) exempts from the operation of the whole act "fiscal" operations of the Treasury Department. There is grave doubt whether the term "fiscal" would include revenue-collecting operations and other activities of the Bureau of Internal Revenue and the Bureau of Customs, the activities of the Comptroller of the Currency, and those of the Public Debt Service.

RAILROAD RETIREMENT BOARD

WASHINGTON, *July 29, 1941.*

CLERK, SUBCOMMITTEE ON ADMINISTRATIVE PROCEDURE OF THE COMMITTEE ON THE JUDICIARY,
House of Representatives, Washington, D. C.

DEAR SIR: In the course of my testimony before the subcommittee with respect to S. 675 (stenographic transcript, pp. 1135–1136), Senator O'Mahoney asked me to submit to the committee a suggested amendment of section 203 which would restrict that section so as not to apply to the type of regulation I had been discussing. I would suggest that the section be amended as follows (amendatory language italics):

"SEC. 203. EFFECTIVE DATE OF RULES.—No *substantive* regulation *which causes any change in the legal consequences of action taken after the effective date of the regulation and which is* hereafter promulgated by an agency shall take effect until forty-five days after the date of its initial publication in the Federal Register unless the regulation or the statute by authority of which it is promulgated provides a longer period; but this limitation upon the time when a regulation takes effect may be reduced or eliminated by certification of the agency, published with the regulation in the Federal Register, that stated circumstances require the effective date to be advanced as specified."

In my testimony also (transcript, pp. 1148 to 1160) I discussed the inadvisability of applying title III of that bill to the formal adjudicatory processes of the Board. I received the impression that the members of the subcommittee who were present also felt that title III should not apply to such proceedings and were inclined to feel that it would not apply as drafted. In order to make it clear that the title does not apply to such proceedings, I would suggest that, in the event provisions

along the line of title III of that bill are to be reported favorably, consideration be given to the following amendment:

On page 11, strike out lines 4 to 7, inclusive, and substitute the following: "only to proceedings wherein (1) a violation of law or regulations is charged, and (2) a representative of the agency is to appear in the proceeding in support of the position that such violation has occurred. They * * *."

Very truly yours,

LESTER P. SCHOENE, *General Counsel.*

ADMINISTRATOR OF EXPORT CONTROL

DEPARTMENT OF COMMERCE BUILDING

WASHINGTON

Hon. CARL A. HATCH,
Chairman, Judiciary Subcommittee on Senate Bills 674, 675, and 918,
United States Senate.

DEAR SENATOR HATCH: It has come to my attention that hearings are now being held by the subcommittee, of which you are chairman, of the Committee on the Judiciary of the United States Senate, on the following Senate bills dealing with administrative procedure: S. 674, S. 675, and S. 918. A study of these bills has led me to the conclusion that several sections dealing with the adjudicatory and rule-making processes would in all probability apply to my office which is the Office of the Administrator of Export Control. Export Control was established pursuant to section 6 of the act of July 2, 1940 (54 Stat. 712, 714), which reads:

"Whenever the President determines that it is necessary in the interest of national defense to prohibit or curtail the exportation of any military equipment or munitions, or component parts thereof, or machinery, tools, or material, or supplies necessary for the manufacture, servicing, or operation thereof, he may by proclamation prohibit or curtail such exportation, except under such rules and regulations as he shall prescribe. Any such proclamation shall describe the articles or materials included in the prohibition or curtailment contained therein. In case of the violation of any provision of any proclamation, or of any rule or regulation, issued hereunder, such violator or violators, upon conviction, shall be punished by a fine of not more than $10,000, or by imprisonment for not more than two years, or by both such fine and imprisonment. The authority granted in this section shall terminate June 30, 1942, unless the Congress shall otherwise provide."

By a military order the President directed me to administer the provisions of the said section 6. In accordance with the terms of the proclamations issued by the President pursuant to this statutory authorization, articles and materials prohibited exportation may only be exported under license. Executive Order No. 8712, issued March 15, 1941, directs the Secretary of State to issue such licenses unless I have determined, under the President's direction, that the proposed exportation would be detrimental to the interests of national defense. By virtue of Executive Order No. 8713, issued March 15, 1941, a similar duty is imposed upon me to issue licenses for the exportation of articles and materials containing plans, specifications, or descriptive or technical information not generally available to the public.

The provisions of two of the three bills under consideration would require a radical change in the licensing procedure now in operation. Title III of S. 674, dealing with administrative adjudications, would apply to the procedure for passing on applications for export licenses since the definition of "adjudication" contained in section 102 (d) specifically includes licensing proceedings. Titles VI and VII of S. 918, dealing with administrative settlement of controversies, would also apply since section 1 (10) defines controversies to include those relating to licensing. Title III of S. 674 and title VII of S. 918 provide for formal hearings in the event that informal procedure does not result in consent dispositions. Since several hundred license applications are handled by the Department of State and by this office each day, and since expeditious disposition of such applications is necessary in order not to disrupt the commercial transactions of this country, it is evident that the requirement of formal hearings, with the delay necessarily incident thereto, would be totally inappropriate for this type of licensing system and would entail serious consequences. It is my opinion that the system of licensing set up by the President was not intended to be subjected to the provisions just referred to.

The provisions concerning rule making contained in these bills would also have an undesirable effect upon this office. Sections 201 (2) and 203 of S. 675 require the publication of all general policies, interpretations of law, rules, regulations, and procedures, whether formal or informal. It would seem that these sections would apply to the confidential directives which are furnished by me to the Department of State and to the Licensing Division of this office and upon which the disposition of license applications is based, as well as to various informal rulings which are from time to time made in this office. It is felt that the publication of these confidential directives and informal rulings would be definitely contrary to the interest of national defense. Therefore the application of these sections to this office would be clearly undesirable. A somewhat similar requirement for the publication of rules is contained in title III of S. 918. The action taken by me in this connection is that of a staff officer of the President as Commander in Chief and hence not within the scope of the proposed legislation.

This office is a temporary agency and should be classified separately from the ordinary permanent agencies. It is engaged in carrying out important national defense functions. From the preceding discussion it is evident that the application of the provisions of any of the three bills now being considered by your subcommittee would seriously interfere with the exercise of those functions. Therefore an exemption from the application of any one of these bills which should receive favorable action by your subcommittee is requested.

The following specific recommendations are submitted. If either S. 674 or S. 675 receives the approval of your subcommittee, it is requested that the following paragraph be inserted:

"Nothing contained in this Act shall apply to or affect any matter concerning or relating to the administration of section 6 of the Act of Congress entitled 'An Act to expedite the strengthening of the national defense', approved July 2, 1940 (54 Stat. 714)."

In the event S. 918 should receive the approval of your subcommittee, it is requested that the following paragraph be added to section 900:

"(i) The administration of section 6 of the Act of Congress entitled 'An Act to expedite the strengthening of the national defense', approved July 2, 1940 (54 Stat. 714)."

Sincerely yours,

R. L. MAXWELL,
Brigadier General, United States Army, Administrator.

STATEMENT OF WILLIAM C. FITTS, JR., GENERAL CIUNSEL, TENNESSEE VALLEY AUTHORITY, ON S. 674, . 675, AND S. 918, NOW PENDING BEFORE THE SENATE COMMITTEE ON THE JUDICIARY

S. 674, S. 675, and S. 918 are intended to provide for the improvement of the practices and procedure of Federal administrative agencies. It is clear from the terms of these bills, from their legislative history, and from the discussions of these measures both in and out of Congress that they are directed to quasi-judicial and quasi-legislative agencies. The Authority is not such an agency, but rather a business agency of the Government, concerned primarily with the development of national resources and the disposition of Government property, that is, hydroelectric power and fertilizer. The bills are, however, so broadly drawn that they may be interpreted to cover the Authority's operations, and the application of the terms of bills designed in the light of the requirements of one type of agency to an agency of an altogether different type would make it impossible for the Authority to function effectively.

We do not think it would be appropriate for the Authority to comment generally upon these measures and do not intend to enter into the discussion of the necessity of reform of Federal administrative practices. It is the purpose of this memorandum only to show the possibility that the bills may be interpreted as being applicable to the Authority, and to illustrate the effect of such an interpretation upon the Authority's business operations.

S. 674 will serve to illustrate some of the possible effects of these measures upon the Authority. The bill is made applicable to all Federal agencies, which are defined to include authorities and corporations, unless otherwise expressly stated or required by the context. Section 202 (d) requires that—

"Each agency shall issue, in the form of rules, all necessary or appropriate rules interpreting the statutory provisions under which it operates, and such rules shall reflect the interpretations currently relied upon by such agency and not otherwise published in the form of rules."

Similar rules are required to define legislative policies to the extent not clearly specified in legislation. Agencies are prohibited from acting on unpublished rules, instructions, or statements of policy. The only specific exemptions are the conduct of national defense or diplomatic functions. An analysis of the possible application of these rules to the Authority will reveal how incompatible they are with the efficient conduct of operations such as those of the Authority.

The Authority has no power to require action of any citizen. It has never held a hearing. The Authority's relations with private citizens and with the local agencies of the area in which it operates are governed entirely by contracts. The contracts are in every case entered into without compulsion and on negotiated terms. Hardly two contracts will be identical; and, in fact, changes in circumstances require the amendment of most agreements from time to time during their respective terms. It is obvious that in order to be free to meet changed circumstances and to protect the Government's interests in negotiations, a high degree of flexibility is essential. To forecast the effect of any rule for the future is impossible. If the Authority were required to formulate rules under S. 674, every agency with which the Authority has a contract or with which the Authority proposes to contract would, of course, immediately attempt to figure out some way in which it could utilize such rules to its advantage by bringing itself within a state of facts to which the rules were not intended to apply, or by taking advantage of language inadvertently drawn. The Authority must say frankly that it does not believe it could formulate such rules in a manner which would protect the interests of the Government.

If new situations should arise requiring urgent action not permissible under existing rules, the Authority would be required, before it could meet the problem, to go through an elaborate rule-making procedure. In the meantime, construction of important projects might be suspended, it might be impossible to deliver power which was urgently required, or farmers might be without the fertilizer required for their crops. It is true that under section 209 (e) the procedural directions for the adoption of rules may be dispensed with in emergencies, but whether an emergency existed might, under section 211, be made a subject of litigation which would indefinitely postpone essential business action.

The provisions of S. 674 are so little related to the functions of the Authority that it is impossible to predict with assurance in precisely what situations and in what manner its provisions would apply, but it is easy to see that they might apply in almost any business relation. Suppose that the ingenuity of an interested coal merchant made it impossible for the Authority to purchase coal required for the operation of essential power plants, what would be the effect upon the nearly half million customers and two and a half million people dependent upon the Authority for their power requirements? Suppose that a controversy between prospective purchasers of hydroelectric power as to who was entitled to the purchase or at what rates prevented the Authority from disposing of the power to either during a period of high water. The power would go to waste, and the Government would suffer a loss of revenues which could never be recovered. Suppose that a power company should be able to prevent the Authority from contracting with a municipality for a power supply badly needed by the municipality, or that fertilizer interests were able to prevent the Authority from fulfilling its contractual obligations to supply to the Department of Agriculture the phosphatic fertilizers required in the Department's conservation program. The act might cause almost unlimited waste, confusion, and inefficiency in the administration of the Authority's functions.

It may be said that many of the provisions of the bill would not be applicable to the Authority. If this is the case, it should be confirmed by specific language. Section 110 provides that any member, officer, or employee of any agency who violates the mandatory provisions of the act shall be subject to discharge from the public service or lesser administrative disciplinary action. The peril in which this places administrative officers in interpreting the statute is such that no substantial question of interpretation which it is possible to clarify should be left open.

S. 918 would have a substantially similar effect upon the Authority. Under section 900, any matter concerning or relating to the procurement or disposi-

tion of public property is excluded from the scope of the act, a recognition of the impossibility of applying to a business agency provisions designed for quasi-judicial and quasi-legislative agencies. The language of the exemption, however, may defeat its purpose, since it applies only to the procurement or disposition of public property, "as distinguished from any controversies arising under contracts and agreements for procurement or disposition of public property." Since a controversy is defined by section 1 (10) to include any dispute or disagreement between any person and any agency, it seems clear that any matter relating to the procurement or disposition of public property could be thrown into controversy under the statute by anyone interested in so doing, whereupon all the provisions of the act would become applicable.

S. 675 would probably not be applicable to most of the Authority's business functions. We think the Authority should be specifically exempted as not within the purposes of the bill, but we do not believe that the enactment of S. 675 would be of serious consequence to the Authority.

If the committee should conclude that the Authority should be exempted from the scope of these measures, it is suggested that the simplest method of excluding the Authority and similar agencies would be to add a clause in substantially the following language to the definition of the word "agency" in each of the measures now under consideration: "but shall not include agencies, corporations, or authorities engaged primarily in the construction or administration of public works."

The clause should be added at the end of section 102 (a) of S. 674 and at the end of section 1 (2) of S. 918. In the case of S. 675, the new language should be inserted before the last sentence of section 102 (a), so that this provision will read in full as follows:

"(a) 'Agency' means any department, board, commission, authority, corporation, administration, independent establishment, or other subdivision of the executive branch of the Government of the United States which is empowered by law to determine the rights, duties, immunities, or privileges of persons, other than persons in their capacity as employees of the United States, by the making of rules and regulations or by adjudications which are unreviewable except by the courts, but shall not include agencies, corporations, or authorities engaged primarily in the construction or administration of public works. Where the context warrants, 'agency' means more particularly the officer or group of officers within an agency as above defined who are not subordinate or responsible to any other officer therein."

We have made an analysis of the functions of the various Federal agencies to determine which agencies would be exempt under the foregoing language. The following would, in our opinion, be exempt:

The Panama Canal (War Department).
Bureau of Reclamation (Department of the Interior).
National Park Service (Department of the Interior).
Bonneville Power Administration (Department of the Interior).
Public Buildings Administration.
Public Roads Administration.
Work Projects Administration.
Defense Plant Corporation (R. F. C.)
American Battle Monuments Commission.
National Capital Park and Planning Commission.
Smithsonian Institute.
Tennessee Valley Authority.

In addition to the agencies listed above, a number of agencies operating in the Territories and possession would be exempted, including the Panama Railway, the Alaska Railway, the Alaska Road Commission, the Puerto Rico Reconstruction Administration, and The Virgin Islands Co.

UNITED STATES TARIFF COMMISSION

WASHINGTON, *March 29, 1941.*

The Honorable CARL A. HATCH,
Chairman of the Judiciary Subcommittee on Administrative Procedure Bills, United States Senate.

DEAR SENATOR HATCH: I refer to the letter of February 26, 1941, inviting the views of the Tariff Commission with regard to S. 674, S. 675, and S. 918 of the

Seventy-seventh Congress, now pending before the subcommittee of the Senate Judiciary Committee.

At the outset, it may well be questioned whether Tariff Commission functions are intended to be covered by any of the bills in question. The Tariff Commission has no authority to issue any rules affecting the rights of persons or property. All of our statutory authorizations relate to the ascertainment of facts for the assistance of the President and the Congress, and we make no decisions that either directly affect individuals or that require any action so affecting individuals; however the Tariff Commission is not specifically excluded from the scope of the bills, and we have studied them with a view to determining to what extent, if any, they would seriously impede our statutory functions.

The Tariff Commission does not appear to be included within the definition of "agency" in section 102 of S. 675, and the bill would accordingly appear to be inapplicable to us; however, even though the Tariff Commission should be designated by the Director, pursuant to section 106 (1), as being within the scope of S. 675, it would not appear to impede or hamper our normal operations.

The principal if not the sole functions of the Commission that might be directly affected by the enactment of S. 674, if that bill should be regarded as at all applicable to the Tariff Commission, are proceedings under section 337 of the Tariff Act of 1930, aimed at the prevention of unfair competition in the importation of merchandise. Sections 108, 306, and 309 (1) of S. 674 would apparently require the abandonment of the Commission's "confidential information" rule except as to matters which are "trade secrets or processes" within the meaning of section 335 of the Tariff Act of 1930. Briefly, our confidential information rule is that the Commission withholds from disclosure individual business data, including costs of production and other matters ordinarily considered personal to the companies or individuals concerned, and publishes data in the form of averages to avoid disclosing individual operations. The background of the rule is well set forth in the decision of the Supreme Court in *Norwegian Nitrogen Products Co.* v. *United States*, decided February 6, 1933 (288 U. S. 294), wherein the court approved the Commission's practice. Throughout the Commission's experience of 25 years in the ascertainment of facts to aid the President and the Congress, the maintenance of the rule respecting nondisclosure of individual data has been considered of paramount importance in order effectively to perform our duties. If the rule is required to be abandoned, it seems clear that the Commission's effectiveness as a source of information will be seriously impaired.

Section 108 of S. 674 might also preclude the Commission from publishing notice of receipt of a complaint under section 337 of the tariff act. The practice of publishing these notices was adopted by the Commission because it had been found impossible to make adequate preliminary investigations without such public information. The Commission also determined that public notice of the pendency of complaints was necessary in the interest of fairness to importers and others engaged in the trade. The new procedure has received several favorable comments and none which were unfavorable. The Commission believes that departure from this practice would be distinctly retrogressive.

Section 309 (a) of S. 674 might, moreover, preclude the Commission's counsel from drafting findings and also from being consulted in the preparation of findings. Likewise, section 309 (m) would prevent consultation with technical experts except in the presence of interested parties. Since neither the Commission nor its counsel prosecutes investigations under section 337 of the Tariff Act, but rather performs the sole functions of ascertaining and disclosing pertinent facts without being interested in any particular outcome, no reason is seen why this principle of the bill should be applied to the Tariff Commission. Its application would make it impossible for the Commission to perform the functions required of it by law.

Most if not all of the objections to applying S. 674 to the Tariff Commission are similarly applicable to S. 918. The latter bill being more rigid is even less susceptible of application to us than S. 674. In addition, S. 918 would apparently create a monopoly in lawyers for the practice in cases under section 337 of the Tariff Act and possibly in other Tariff Commission proceedings, and would deny the Commission any effective restraint with regard to regulating practice before it. The bill would not even permit the Commission to exclude from practice a former employee who had worked for the Commission in the very proceeding in which he may later seek to represent an interested party.

As indicated at the opening of this communication, Tariff Commission inquiries are primarily for the ascertainment of economic facts, and questions of law are involved only secondarily. All hearings of the Commission are conducted by members of the Commission. Under title VII of S. 918, however, interested parties would appear to be entitled to require hearings to be conducted outside the District of Columbia, and such hearings would be presided over by local lawyers "learned in the law." It is the considered opinion of the Tariff Commission that a lawyer, whatever his legal attainments, would not ordinarily be qualified to conduct a Tariff Commission hearing, unless he had training or experience in the specialized economic field in which the Tariff Commission operates.

Our analyses of the bills have disclosed further matters of detail which would impede or obstruct the exercise of Tariff Commission functions, but we have not deemed it advisable to protract this letter with such detailed matters. Since we feel that it is probably not the intention to restrict the Tariff Commission's activities by the provisions of the bills, it is suggested that the Tariff Commission be specifically excluded from the purview of the bills.

Sincerely yours,

OSCAR B. RYDE, *Acting Chairman.*

SECURITIES AND EXCHANGE COMMISSION

WASHINGTON, *May 12, 1941.*

Hon. CARL A. HATCH,
United States Senate,
Washington, D. C.

MY DEAR SENATOR HATCH: Since testifying before your committee regarding the various administrative law bills that you are presently considering I have reexamined my testimony and find a statement which I should like to expand slightly for purposes of clarification.

Senator O'Mahoney asked me the following question: "Has the Commission adopted at any time a rule or minute dealing with this question of interpretive rulings?" and my answer to that question was, "I do not know whether that has been formulized into a rule. It has just grown up, Senator. I do not think it is the result of a precise instruction. I do not think it has been frozen into a rule."

My answer relating to the existence of a rule was correct; however, I find that as a matter of practice there is a precise instruction which covers the situation and, in effect, has the same result as though it were formulized into a rule. That comes about in this way. All of our interpretative attorneys working in our regional offices are given a preliminary training period in the Interpretative Division of the General Counsel's office. As a part of that training they are specifically instructed that where questions are presented to them for an interpretative ruling they are to refer the matter to the Washington office for consideration, if it involves a question that has not been previously determined in an existing General Counsel's interpretative opinion, and it is made absolutely clear to them that they may give interpretations, without reference, only on questions for which there is Commission precedent.

My answer in line 7 on page 590 that the question of reference rests pretty much in the "judgment" of the regional Interpretative attorney, of course, is subject to the limitation of the precise instruction that I have mentioned above—that is to say, his exercise of judgment is limited to whether the question before him has been previously covered specifically by an existing General Counsel's opinion.

It has occurred to me that this further explanation more clearly describes our practice and procedure on a question concerning which your committee has expressed considerable interest and, if appropriate, it might be desirable to add this further explanation to the record before your committee.

Sincerely yours,

ROBERT E. HEALY, *Commissioner.*

SUPPLEMENTARY STATEMENT FILED ON BEHALF OF FEDERAL COMMUNICATIONS COMMISSION CONCERNING THE ADMINISTRATIVE PROCEDURE BILLS

On behalf of the Federal Communications Commission, there is herewith presented a statement supplementing the testimony of Chairman Fly (pp. 214-242, pt. 1, hearings of April 18, 1941), addressed to those issues developed at the hearings which appear to touch closely on the work of the Federal Communications Commission. The following specific subjects are covered:

(I) Practice of the Commission on Petitions for Intervention.
(II) Commission's Proposed Finding Procedure.
(III) Amendment of Hearing Procedure Provisions of S. 675.

I. INTERVENTION

The Commission's practice on intervention must be considered against the background of the provisions of the Communications Act governing the granting or denying of applications.

Section 309 (a) of the act provides as follows:

"(a) If upon examination of any application for a station license or for the renewal or modification of a station license the Commission shall determine that public interest, convenience, or necessity would be served by the granting thereof, it shall authorize the issuance, renewal, or modification thereof in accordance with said finding. In the event the Commission upon examination of any such application does not reach such decision with respect thereto, it shall notify the applicant thereof, shall fix and give notice of a time and place for hearing thereon, and shall afford such applicant an opportunity to be heard under such rules and regulations as it may prescribe."

Section 308 (b) of the act provides as follows:

"(b) All such applications shall set forth such facts as the Commission by regulation may prescribe as to the citizenship, character, and financial, technical, and other qualifications of the applicant to operate the station; the ownership and location of the proposed station and of the stations, if any, with which it is proposed to communicate; the frequencies and the power desired to be used; the hours of the day or other periods of time during which it is proposed to operate the station; the purposes for which the station is to be used; and such other information as it may require. The Commission, at any time after the filing of such original application and during the term of any such license, may require from an applicant or licensee further written statements of facts to enable it to determine whether such original application should be granted or denied or such license revoked. Such application and/or such statement of fact shall be signed by the applicant and/or licensee under oath or affirmation."

These provisions make it mandatory for the Commission to grant an application without a hearing if, after a thorough consideration of the application and such other information as it may require of the applicant, it determines that public interest, convenience, or necessity will be served by a grant of the application. "Examination" of an application, and such additional information as may be requested to determine whether to grant an application, does not consist of any mere superficial study. Rather, it consists of a complete legal and technical analysis of all the facts involved and all questions and factors which have a bearing upon the determination of whether a grant of the application would serve public interest, convenience, or necessity.

The purpose of the act is to promote the interest of the public in having radio facilities assigned as promptly as possible so as to permit the full utilization of the radio facilities in the public interest[1] while at the same time affording the maximum protection to applicants against unwarranted denials of licenses to operate radio equipment. This objective is accomplished by directing the Commission to grant applications without a hearing if it determines from a consideration of the application that public interest, convenience, or necessity would be

[1] Sec. 1 of the Communications Act provides in part: "For the purpose of regulating interstate and foreign commerce in communication by * * * radio so as to make available, so far as possible, to all the people of the United States, a rapid, efficient, Nationwide, and world-wide * * * radio communications service with adequate facilities * * * there is hereby created a Commission to be known as the "Federal Communications Commission'."

served by a grant thereof, but requiring that notice and an opportunity to be heard be given to the applicant before his application is denied. Notice and an opportunity to be heard, it should be observed, are required to be given to the applicant and not to some other person asserting an interest adverse to the applicant.

There is nothing in the Communications Act which creates an exception to the procedure of granting licenses without hearing so as to require that a hearing be held upon request of persons other than the applicant. Nor is it contemplated by the act that where the Commission has reached the determination that public interest, convenience, or necessity will be served by a grant of the application, it must also inquire into the possible adverse effect a grant of the application might have upon the private interests of any other person, or to hold a hearing upon the request of such person in order to consider this factor. Indeed, as the Supreme Court held in *Federal Communications Commission* v. *Sanders Brothers Radio Station* (309 U. S. 470), the effect of the grant of an application upon the private interests of persons other than the applicant is not in and of itself a factor which the Commission need consider. Hence, where this is the only reason for which a hearing, or participation in a hearing, is desired by a person other than an applicant, such hearing or participation would be entirely fruitless. Any requirement for mandatory hearings merely for the furtherance of private interests, where no question of public interest is also involved, would defeat rather than serve the express purpose of the act to "encourage the larger and more effective use of radio in the public interest"[2] and would make the Commission's processes convenient devices for the obstructionist tactics of persons desirous of preventing the establishment of additional broadcast facilities. The mandate to the Commission to grant applications without hearings, where a showing has been made that public interest will be served by the grant, is fundamental and essential to a proper execution of the Commission's functions.

The question of intervention, therefore, arises only in the situation where the Commission has been unable to determine from a consideration of the application and other information that public interest, convenience, or necessity will be served by a grant thereof and has accordingly designated the application for hearing.

The Commission's rule on intervention (Sec. 1.102 of the Rules of Practice and Procedure) has been adopted to establish a procedure which will "conduce to the proper dispatch of business and to the ends of justice,"[3] and with the object of securing the fulfillment of the purposes of the act.

It reads as follows:

"Sec. 1.102. Petitions for intervention must set forth the grounds of the proposed intervention, the position and interest of the petitioner in the proceeding, the facts on which the petitioner bases his claim that his intervention will be in the public interest, and must be subscribed or verified in accordance with section 1.122. The granting of a petition to intervene shall have the effect of permitting intervention before the Commission but shall not be considered as any recognition of any legal or equitable right or interest in the proceeding. The granting of such petition shall not have the effect of changing or enlarging the issues which shall be those specified in the Commission's notice of hearing unless on motion the Commission shall amend the same."

The leading decision by the Commission interpreting the intervention rule was that contained in the published opinion, September 29, 1939, by Commissioner George Henry Payne upon a petition to intervene filed by Orlando Broadcasting Co., Inc., in connection with the application of Hazelwood, Inc., Orlando, Fla., for a new radio broadcast station. In passing upon the sufficiency of this petition, the opinion set forth the reasons for the adoption of the intervention rule as follows:

"The underlying purpose of the Commission in adopting its present rule on intervention was to correct a practice which had become prevalent under the prior rule of the Commission relating to intervention. Under its former rule, the Commission permitted any person to intervene in a hearing if his petition disclosed 'a substantial interest in the subject matter.' This standard was so broad and the Commission's practice under it was so loose that intervention in Commission hearings came to be almost a matter lying in the exclusive discretion of persons seeking to become parties to Commission proceedings. The experience of the Commission during the past few years clearly demonstrated

[2] Sec. 303 (g), Communications Act.
[3] Sec. 4 (j), Communications Act.

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Section 308 (b) of the act provides as follows:

"(b) All such applications shall set forth such facts as the Commission by regulation may prescribe as to the citizenship, character, and financial, technical, and other qualifications of the applicant to operate the station; the ownership and location of the proposed station and of the stations, if any, with which it is proposed to communicate; the frequencies and the power desired to be used; the hours of the day or other periods of time during which it is proposed to operate the station; the purposes for which the station is to be used; and such other information as it may require. The Commission, at any time after the filing of such original application and during the term of any such license, may require from an applicant or licensee further written statements of facts to enable it to determine whether such original application should be granted or denied or such license revoked. Such application and/or such statement of fact shall be signed by the applicant and/or licensee under oath or affirmation."

These provisions make it mandatory for the Commission to grant an application without a hearing if, after a thorough consideration of the application and such other information as it may require of the applicant, it determines that public interest, convenience, or necessity will be served by a grant of the application. "Examination" of an application, and such additional information as may be requested to determine whether to grant an application, does not consist of any mere superficial study. Rather, it consists of a complete legal and technical analysis of all the facts involved and all questions and factors which have a bearing upon the determination of whether a grant of the application would serve public interest, convenience, or necessity.

The purpose of the act is to promote the interest of the public in having radio facilities assigned as promptly as possible so as to permit the full utilization of the radio facilities in the public interest[1] while at the same time affording the maximum protection to applicants against unwarranted denials of licenses to operate radio equipment. This objective is accomplished by directing the Commission to grant applications without a hearing if it determines from a consideration of the application that public interest, convenience, or necessity would be

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served by a grant thereof, but requiring that notice and an opportunity to be heard be given to the applicant before his application is denied. Notice and an opportunity to be heard, it should be observed, are required to be given to the applicant and not to some other person asserting an interest adverse to the applicant.

There is nothing in the Communications Act which creates an exception to the procedure of granting licenses without hearing so as to require that a hearing be held upon request of persons other than the applicant. Nor is it contemplated by the act that where the Commission has reached the determination that public interest, convenience, or necessity will be served by a grant of the application, it must also inquire into the possible adverse effect a grant of the application might have upon the private interests of any other person, or to hold a hearing upon the request of such person in order to consider this factor. Indeed, as the Supreme Court held in *Federal Communications Commission* v. *Sanders Brothers Radio Station* (309 U. S. 470), the effect of the grant of an application upon the private interests of persons other than the applicant is not in and of itself a factor which the Commission need consider. Hence, where this is the only reason for which a hearing, or participation in a hearing, is desired by a person other than an applicant, such hearing or participation would be entirely fruitless. Any requirement for mandatory hearings merely for the furtherance of private interests, where no question of public interest is also involved, would defeat rather than serve the express purpose of the act to "encourage the larger and more effective use of radio in the public interest"[2] and would make the Commission's processes convenient devices for the obstructionist tactics of persons desirous of preventing the establishment of additional broadcast facilities. The mandate to the Commission to grant applications without hearings, where a showing has been made that public interest will be served by the grant, is fundamental and essential to a proper execution of the Commission's functions.

The question of intervention, therefore, arises only in the situation where the Commission has been unable to determine from a consideration of the application and other information that public interest, convenience, or necessity will be served by a grant thereof and has accordingly designated the application for hearing.

The Commission's rule on intervention (Sec. 1.102 of the Rules of Practice and Procedure) has been adopted to establish a procedure which will "conduce to the proper dispatch of business and to the ends of justice,"[3] and with the object of securing the fulfillment of the purposes of the act.

It reads as follows:

"Sec. 1.102. Petitions for intervention must set forth the grounds of the proposed intervention, the position and interest of the petitioner in the proceeding, the facts on which the petitioner bases his claim that his intervention will be in the public interest, and must be subscribed or verified in accordance with section 1.122. The granting of a petition to intervene shall have the effect of permitting intervention before the Commission but shall not be considered as any recognition of any legal or equitable right or interest in the proceeding. The granting of such petition shall not have the effect of changing or enlarging the issues which shall be those specified in the Commission's notice of hearing unless on motion the Commission shall amend the same."

The leading decision by the Commission interpreting the intervention rule was that contained in the published opinion, September 29, 1939, by Commissioner George Henry Payne upon a petition to intervene filed by Orlando Broadcasting Co., Inc., in connection with the application of Hazelwood, Inc., Orlando, Fla., for a new radio broadcast station. In passing upon the sufficiency of this petition, the opinion set forth the reasons for the adoption of the intervention rule as follows:

"The underlying purpose of the Commission in adopting its present rule on intervention was to correct a practice which had become prevalent under the prior rule of the Commission relating to intervention. Under its former rule, the Commission permitted any person to intervene in a hearing if his petition disclosed 'a substantial interest in the subject matter.' This standard was so broad and the Commission's practice under it was so loose that intervention in Commission hearings came to be almost a matter lying in the exclusive discretion of persons seeking to become parties to Commission proceedings. The experience of the Commission during the past few years clearly demonstrated

[2] Sec. 303 (g), Communications Act.
[3] Sec. 4 (j), Communications Act.

that the participation of parties other than the applicant in broadcast proceedings in a great many cases resulted in unnecessarily long delays and expense to both the Commission and applicants without any compensating public benefit. In many cases the major function served by intervenors was to impede the progress of the hearing, increase the size of the record, confuse the issues and pile up costs to the applicant and to the Commission through the introduction of cumulative evidence, unnecessary cross-examination, dilatory motions, requests for oral argument and other devices designed to prevent expeditious disposal of Commission business."

The decision set forth at considerable length the percise requirements of a proper petition for intervention under Rule 1.102 in the following language:

"The underlying purpose of the present rule is to limit participation in proceedings, patricularly on broadcast applications, to those persons whose participation will be of assistance to the Commission in carrying out its statutory functions. The present rule requires a petitioner to set forth not only his interest in the proceeding but also the facts on which the petitioner bases his claim that his intervention will be in the public interest.' The fact that a proposed intervener may have the right to contest in a court the validity of an order granting or denying a particular application does not in and of itself mean that such person is entitled as a matter of right to be made a party to the proceedings before the Commission on such application. Intervention in proceedings before administrative agencies like the Federal Communications Commission is ordinarily covered by statutory provision. The Communications Act contains no provisions giving the right of intervention in proceedings before the Commisison to any person or class of persons, but expressly provides that the Commission may conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice. By the adoption of Rule 1.102 the Commission, ineffect, has declared that it will conduce to the proper dispatch of business and to the ends of justice if it permits intervention in a proceeding before it only if the making of a record in which the facts are fully and completely developed, is facilitated by permitting the requested intervention. It is this theory—that where the public will benefit through aid or assistance given to the Commission or the applicant by a party intervenor in a broadcasting hearing, such participation should be permitted—which underlies Rule 1.102.

"The petition of the Orlando Broadcasting Co., Inc., utterly fails to meet the requirement of the present rule on intervention. Insofar as it requests permission to participate in the hearing already designated on the application of Hazelwood, Inc., it simply prays that the petitioner be made a party and be allowed to present 'evidence.' Not the slightest intimation is given as to the type of evidence which the petitioner desires to adduce or what petitioner intends to prove by the introduction of such evidence. The only issue mentioned in the Commission's notice of hearing is the issue of electrical interference to stations KLRA, WHK, and WMFJ, which are now operating either on 1390 kilocycles (the frequency requested by Hazelwood, Inc.) or on adjacent frequency. The petitioner operates its station on 580 kilocycles, so there would be no electrical interference to petitioner's station, and while it would not be impossible for the petitioner to obtain data on the issue specified in the Commission's Notice of Hearing, it is not likely that the petitioner is as well-informed or is as well equipped to adduce testimony concerning the issue of electrical interference as is the Commission itself. Without a proper showing of the type of evidence proposed to be adduced and the facts expected to be proved thereby, the Commission would not be justified in permitting the petitioner to intervene in the proceedings on the application of Hazelwood, Inc."

The petition of Orlando Broadcasting Co., Inc., as well as nine other petitions to intervene then pending were deemed not to comply with the requirements of the rule and, accordingly, all of these petitions were denied. Upon review by the full Commission, Commissioner Payne's action in denying these petitions was unanimously affirmed.

Since the date of the Commission's action affirming the decision in the Hazelwood case, 123 petitions to intervene have been acted upon by presiding Commissioners of the Motions Docket. Of these, 71 have been granted, 21 have been denied, 12 have been dismissed, and 19 have been dismissed without prejudice to the filing of new petitions.

In general, it may be said that denials and dismissals of petitions to intervene have been based upon the fact that the proposed intervener desired only to show

at the hearing the manner in which his private interests would be affected by a grant of the application, and in many instances the proposed intervener did not indicate that he was prepared to show even this much. Such petitions have failed to address themselves to any considerations of public interest or to facts which would constitute valid grounds for denial of the application in which participation was sought by the objecting person.

The Commission has not insisted upon a strict technical compliance with the intervention rule, but, on the contrary, has been extremely liberal in granting petitions to intervene in cases where the petition and oral argument in support thereof have indicated that the purpose of the rule would be served by allowing the intervention. Thus, although some petitions have merely alleged that the petitioner had evidence upon the issues designated for hearing which it proposed to offer and which was not otherwise available to the Commission, they have been deemed to be in substantial compliance with the rule where it appeared upon consideration of the petition and oral argument that the purpose of the rule would be served by permitting intervention. In the last analysis, therefore, the determination of whether intervention should be allowed or denied has turned upon the substance of the petitioner's proposal rather than upon the form of the petition.

The net result of the operation of the Commission's rule on intervention has been that the number of petitions to intervene has diminished substantially within the past year. The average number of parties in hearings has been reduced considerably and in many cases in which under the old rules several parties would have been permitted to intervene, no persons other than the applicant have participated in the hearing. This has produced a more expeditious disposal of applications with the consequent saving of time and expense both to the applicants and the Commission. This result has been accomplished without excluding from hearings any person with a legitimate reason for participating as a party.

II. Commission's Proposed Finding Procedure

The Commission's procedure in issuing agency-proposed findings, in lieu of a report of a trial examiner, is described at length in the Monograph of the Attorney General's Committee on Administrative Procedure, part 3, pages 26 to 37. The only substantial issue raised concerning it has been the suggestion that proposed findings promulgated by the agency itself are in reality final findings, and that the agency approaches the subsequent proceedings with a closed mind.

In order to determine the facts in this regard, we have examined the total number of cases since the new procedure of issuing proposed findings was adopted, and we find that from that time to June 1, 1941, there have been reversals in about 35 percent of the cases in which counsel have pressed their case by filing exceptions and requesting oral argument or the filing of briefs in lieu of oral argument.

The following tables have been compiled for the information of the committee:

	Number	Percent
Number of proposed findings issued	87	
Number of proposed findings on which no exceptions were filed	50	57
Number of proposed findings on which exceptions were filed	37	43

With respect to the 37 cases in which exceptions to proposed findings were filed the figures show:

	Number	Percent
Findings set aside and order changed	13	35
Findings modified but decision unchanged	5	14
Findings modified to deny without prejudice	1	3
No change	18	48

The first thing to be noted is that in 57 percent of the cases, counsel accepted the proposed findings. This, in itself, is strong indication of the care and thoroughness with which the proposed findings are prepared.

In the second place, the table shows that in 13 out of 37 cases, or about 35 percent of the cases in which counsel have filed exceptions, the proposed findings were reversed.

These figures leave little doubt that the Commission considers exceptions and oral argument with an open mind. The reversals and modifications in a substantial percentage of the cases conclusively demonstrate that counsel who argue before the Commission receive a full hearing before a body which is prepared to change its proposed findings upon a showing that the findings are in error. Indeed, we believe that the record indicates that there is as high a percentage of reversals and modifications after the Commission has issued proposed findings as there is in many agencies where the findings are put out by an examiner and are then reviewed by the deciding body. It therefore appears that the procedure of the Federal Communications Commission has the advantage of informing counsel of what the Commission and not some subordinate official proposes to do without any asserted disadvantage that this opportunity to be heard is before a body that cannot fairly judge his case. The figures on the number of reversals and modifications show that the Commission does, in fact, have an open mind when it hears counsel.

III. Amendment of Hearing Procedure Provisions of S. 675

The Commission recommended (hearings, p. 239) that in the event the hearing-commissioner formula contained in S. 675 should be adopted, an amendment thereto is necessary which would permit the agency upon the conclusion of the hearing in any case to instruct the hearing commissioner to transmit the entire record in the case to it for the purpose of issuing proposed findings and conclusions.

Title III of S. 675, as a whole, appears to us to be inadequate in failing to recognize the essential difference between (*a*) proceedings in the nature of so-called adjudicatory or prosecutory proceedings, in which the applicable standards of law have already been formulated either by or pursuant to statute and which require only a determination of disputed subsidiary facts, and (*b*) proceedings which require an affirmative determination of administrative policy. Typical of the latter are the proceedings upon applications for radio station construction permits or licenses in which grant or denial depends upon the Commission's determination of the requirements of public interest, convenience, and necessity. In examining the implications of this requirement, the Supreme Court, in an opinion by Mr. Chief Justice Hughes (*Federal Radio Commission* v. *Nelson Bros. Bond & Mortgage Co.*, 288 U. S. 266) said:

"The requirement is to be interpreted by its context, by the nature of radio transmission and reception, by the scope, character, and quality of services and where an equitable adjustment between stations is in view by the relative advantages in service which will be enjoyed by the public through the distribution of facilities."

In *Federal Communications Commission* v. *Pottsville Broadcasting Company* (309 U. S. 137), the Court stated:

"While this criterion [i. e., public interest, convenience, or necessity] is as concrete as the complicated factors for judgment in such a field of delegated authority permit, it serves as a supply instrument for the exercise of discretion by the expert body which Congress has charged to carry out its legislative policy * * *. Underlying the whole law is recognition of the rapidly fluctuating factors characteristic of the evolution of broadcasting and of the corresponding requirement that the administrative process possess sufficient flexibility to adjust itself to these factors * * *. *The Communications Act is not designed primarily as a new code for the adjustment of conflicting private rights through adjudication. Rather it expresses a desire on the part of Congress to maintain through* appropriate administrative control a grip on the dynamic aspects of radio transmission." [Italics supplied.]

The Commission has examined with care the reasons set forth in the report of the committee for the establishment of the office of hearing commissioner and these reasons appear to be applicable only to the first category of proceedings. The proceedings of the Commission which may be said to fall within this category include, for example, revocation of radio licenses.

However, as to the second class of proceedings, which embraces applications for radio station construction permits or licenses, Congress has imposed upon the Commission as its instrument for maintaining "a grip on the dynamic aspect of radio transmission" the duty of determining the requirements of the public in-

terest, convenience, and necessity. To delegate this duty to a corps of individually appointed trial examiners not possessing the requisite expertness in the administrative control of communications would be inconsistent with the basic philosophy of the Communications Act. It must be remembered that expertness in the case of the Federal Communications Commission means a determination achieved through the collaboration of several persons, attorneys, engineers, accountants, and other experts. No single individual possesses a satisfactory combination of all these capacities.

The consequences of applying title III to radio licensing proceedings may be illustrated by an example: It frequently happens in the Commission's practice that two or more persons apply for a permit or license to use a particular radio facility in the same city. The nature of radio is such that the granting of more than one request for the same facility would entirely prevent the use of the facility by any of the grantees. More than one of these applicants may be legally, technically, and financially qualified in all respects under the law. No basis for choosing between them exists except the determination of policy. Congress has charged the Commission with the duty of making this policy determination. The subsequent responsibility of supervising the conduct of successful applicants in rendering communication service rests with the Commission, and as it has the sole responsibility for supervision it should properly have the sole responsibility for selection. The Communications Act embodies this philosophy. The determination of how public interest, convenience, or necessity would best be served rests exclusively with the Commission, an agency created for that express purpose. A decision by a hearing commissioner not equipped by either training or experience to make such a determination would be of little value to the Commission and would serve only to delay the process of determination. Consequently, it is readily apparent that the relationship of the hearing commissioner to the Communications Commission in such a case could not correspond, as contemplated by S. 675, to that existing between a trial court and an appellate court.

We believe that the amendment we have suggested is necessary to provide a suitable degree of flexibility in the proposed hearing commissioner procedure and that the reasons stated above amply support the amendment. We do not believe the effect of the amendment would be to break down the hearing commissioner formula, but that the discretion of the agency in withdrawing cases from the hearing commissioner would be adequately controlled by the expression of the intention of Congress, to which the Commission is responsive, and by the functioning of the proposed office of administrative procedure.

DESIRABILITY OF EXEMPTION OF NATIONAL CREDIT CONTROL POWERS OF FEDERAL RESERVE SYSTEM FROM THE ADMINISTRATIVE PROCEDURE BILLS

BOARD OF GOVERNORS,
FEDERAL RESERVE SYSTEM,
Washington, July 15, 1941.

HON. CARL A. HATCH,
Chairman, Subcommittee of the Committee on the Judiciary,
United States Senate, Washington, D. C.

MY DEAR SENATOR HATCH: The Board of Governors wishes to invite the attention of your subcommittee to the effect of the administrative procedure bills, S. 674, S. 675, and S. 918, upon the exercise by the Federal Reserve System of its powers relating to national credit policies.

From the standpoint of the broad public interest, these powers are the most important exercised by the Federal Reserve System, and some of the restrictions of these bills might seriously impede or render impossible their effective performance. It would seem clearly undesirable to require the Federal Reserve System to take the various steps provided in these bills before engaging in open market operations, changing discount rates, or taking other action necessary to meet rapidly changing conditions in the money market. Moreover, it would seem equally undesirable to require the System to announce the policies which it is currently following in these matters before putting them into effect.

It is not believed that the powers of the Federal Reserve System in the national credit field fall within the general purposes of the administrative procedure bills and, in the circumstances, the Board of Governors earnestly

hopes that your subcommittee will give favorable consideration to an amendment, in form substantially as follows, which would make it clear that these powers of the System are not intended to be affected by the provisions of this legislation:

"Nothing contained in this act shall apply to or affect in any way the exercise of the powers vested in the Federal Reserve System relating to open market operations, rates of interest or discount, margin requirements, reports, changing of reserve requirements, or the exercise of any other powers heretofore or hereafter granted for the pupose of effectuating national credit or monetary policies."

A memorandum is enclosed which states in somewhat more detail the reasons why such an amendment is important.

Respectfully yours,

CHESTER MORRILL, *Secretary.*

Enclosure.

MEMORANDUM

There are a number of provisions in the several administrative procedure bills, S. 674, S. 675, and S. 918, which would make it difficult or impossible for the Federal Reserve System to exercise its powers relating to national credit policies in the manner contemplated by existing law. From the standpoint of the broad public interest, these are the most important powers exercised by the Federal Reserve System. They include, among others, the authority to change by regulation reserve requirements of member banks, to regulate the purchase and sale of securities on the open market by the Federal Reserve banks, to review and determine rates of discount established by the Federal Reserve banks, and to regulate the amount of credit that may be extended and maintained on securities registered on national securities exchanges.

Some of these powers in the field of national credit control are required to be exercised through "regulations" and therefore would be affected by all provisions of these bills regarding the issuance of regulations, unless there is some exception made. All of them might be considered to fall within the various provisions of the bills relating to rate making, the fixing of standards, the adoption of general policies, or the making of decisions, unless exempted by specific provisions.

If any of these bills is enacted in a form which requires previous notice, formal hearings, or any other time-consuming procedure before such powers can be exercised, or which prevents them from becoming effective until after the lapse of a specified length of time, the System would be seriously handicapped in the exercise of these important powers and it would be unable to act promptly enough to protect the public interest. In the field of credit control, action must be taken quickly and without advance public notice. When hostilities began in Europe in September 1939, the Federal Reserve System, in order to maintain an orderly market for United States Government securities, placed substantial buying orders at gradually declining prices, pursuant to a policy which had been previously adopted by the Federal Open Market Committee in anticipation of the possibility of need for action of this kind. These operations could not have been successfully carried out pursuant to this policy if it had been necessary to give notice in advance of the formulation of the policy and hold public hearings, or even if it had been necessary merely to announce the policy before putting it into effect.

As indicated in the letter which this memorandum accompanies, it would seem clearly undesirable to require the Federal Reserve System to take such steps as holding hearings before engaging in open market operations, changing discount rates, or taking other action necessary to meet rapidly changing conditions in the money market; and it would seem equally undesirable to require the Reserve System to announce the policies which it is currently following in these matters before putting them into effect. In this connection, attention is invited to the fact that under a requirement of existing law both the Board of Governors and the Federal Open Market Committee keep a complete record of action taken upon all questions of policy, and this is published, pursuant to a requirement of the statute, in the Board's annual reports to Congress.

The danger of attempting to make the proposed administrative procedure requirements applicable to the powers of the Federal Reserve System relating

to national credit policies is recognized in S. 918, section 900 (d) of which exempts from the provisions of the bill any matter concerning or relating to "fiscal and monetary operations of the Treasury and the Federal Reserve Board, including foreign funds control". Neither of the other bills, however, contains a similar exemption, and it is not clear that the exemption contained in S. 918 is broad enough to cover all of the above powers. Thus it is doubtful whether the exercise of all of the powers would be considered "fiscal and monetary operations." Also the exemption would not make it clear that the actions of the Federal Open Market Committee in establishing and carrying out open market policies are not affected by the legislation.

Under S. 675 it is required that all "general policies" and regulations be made available to the public. While the bill does not specifically state when this is to be done, presumably the intention is that it be done promptly after adoption of the policies. From time to time important policies are adopted by the Federal Open Market Committee regarding its operations or by the Board of Governors with respect to other matters in the national credit field, which might be regarded as "general policies" within the meaning of the bill, and a requirement that a policy which has been thus adopted be made available to the public before the various actions contemplated by the policy have been completed might defeat its purpose. The requirement, therefore, might seriously impede or render impossible the effective performance of these functions of the Federal Reserve System in the national credit field.

UNITED STATES CIVIL SERVICE COMMISSION

WASHINGTON, D. C., *April 29, 1941.*

HON. CARL A. HATCH,
Chairman of Judiciary Subcommittee, United States Senate.

DEAR SENATOR HATCH: Consideration has been given by the Civil Service Commission to the so-called administrative-procedure bills, S. 674, S. 675, and S. 918.

A study of this proposed legislation indicates that it is probably not intended that the formal administrative procedures prescribed by the legislation will apply to administrative matters limited to the interests of officers and employees of the Federal Government. In this connection, it is noted that each of the bills conains as excepted from administrative adjudications, matters related to selection, appointment, promotions, dismissal, or discipline of officers and employees. It is the opinion of the Commission that these things may properly be treated as exceptions, in the manner set out in the proposed legislation. Our preference, insofar as language is concerned, follows that used in S. 675, title III, section 303 (e), which reads: "(e) The selection, appointment, promotion, dismissal, discipline, or retirement of an employee or officer of the United States * * *."

In view of the foregoing, it is believed that it will not be necessary for the Commission to make a request for participation in the forthcoming public hearings.

As you know, the Civil Service Commission is required to follow rather formal hearing procedure in connection with administration of section 12 of the act of August 2, 1939, as amended by the act of July 19, 1940. We are not sure from the context of the administrative-procedure bills whether or not they would cover the Commission's activities under section 12 of the act of August 2, 1939, as amended.

Our enforcement responsibility under the section referred to is limited to removal from office of officers or employees of State or local agencies financed in whole or in part from Federal funds, or in lieu of such separation, institution of proceedings whereby a certain amount of the Federal funds appropriated for such State or local agencies is withheld. It is suggested that this matter be given consideration in order that the terms of the administrative-procedure bill when it is finally drafted may be clear upon the point.

The Bureau of the Budget advised the Commission under date of April 25, 1941, that there would be no objection to the submission of this report to the committee.

By direction of the Commission:

Very respectfully,

HARRY B. MITCHELL, *President.*

ANALYSIS OF SUGGESTIONS FOR THE IMPROVEMENT OF FEDERAL ADMINISTRATIVE PROCEDURE SUBMITTED BY THE MINORITY OF THE ATTORNEY GENERAL'S COMMITTEE

(This chart was submitted by Mr. Arthur T. Vanderbilt, p. 1307, pt. 3, and should be considered in connection with the testimony of the Minority Members of the Attorney General's Committee, pp. 1304 to 1418, pt. 3.)

EXPLANATORY NOTE.—On December 14, 1938, Attorney General Homer S. Cummings recommended to the President the appointment of a committee to study the "need for procedural reform in the wide and growing field of administrative law" and to recommend procedures "grounded upon the fundamentals of fair play." The President thereupon authorized "a thorough and comprehensive study . . . of existing practices and procedures with a view to detecting any existing deficiencies and pointing the way to improvements." Meanwhile the Walter-Logan bill (H. R. 6324) became the center of attention on the subject, passed the Congress, but was vetoed by the President (H. Doc. 986, 76th Cong., 3d session). The President, in his veto message, stressed the appointment of the committee, its studies, and its purpose "to suggest improvements to make the (administrative) process more workable and more just and to avoid confusions and uncertainties and litigations"; and he expressed his "desire to await their report and recommendations before approving any measure in this complicated field."

The report of the committee (S. Doc. No. 8, 77th Cong., 1st session) was submitted to the Senate on January 24, 1941. The members of the committee were in substantial agreement on the report except with reference to (1) the separation of prosecuting and deciding functions and (2) the subject of judicial review. A majority felt that the separation of prosecuting and deciding functions, and placing them in separate agencies, was either unnecessary or unwise (Report, pp. 55–60). A minority of four felt that such separation should be sought wherever practicable (pp. 203–208, 248); and, wherever Congress felt such complete separation to be impracticable, the minority advocated legislation in the form of a code of standards of fair administrative procedure (pp. 213–216). The majority, in addition to rejecting the proposal for the complete separation of adjudicating from all other administrative functions, felt that any legislation should be restricted (pp. 191–192).

The majority bill is discussed in the committee report, particularly in chapter IV at pages 43–55. The minority bill, in addition to a general statement at pages 213–216, is discussed and explained by notes following each proposed provision at pages 217–247 of the report. Senate bills containing the minority and majority recommendations, S. 674 and S. 675, respectively, contain a valuable outline of each proposal in the form of a "Table of Contents." Congressman Walter has also introduced a new measure (H. R. 3464 and S. 918) which is referred to below as the "Walter bill."

In the following chart there is an analysis, subject by subject, of (1) the Walter-Logan bill, (2) the measure suggested by the majority of the Attorney General's Committee, (3) the statement of standards of fair administrative procedure suggested by the minority of the Attorney General's Committee, (4) the report of the Attorney General's Committee, and (5) the new Walter bill.

Subject	Walter-Logan bill (H. R. 6324, 76th Cong., 3d sess.)	Measure recommended by majority of Attorney General's Committee (S. 675)	Proposal of minority of Attorney General's Committee (S. 674)	Report of Attorney General's Committee (S. Doc. No. 8, 77th Cong. 1st sess.)	Walter bill (H. R. 3464 and S. 918)
Declaration of policy	None.	Requires "adequate protection" of private rights or interests, through "known" procedures; and, respecting adjudication, requires "due notice, adequate opportunity to present and meet evidence and argument, and prompt decision."	Similar, but includes, in addition to "rights," the protection of privileges and benefits and stresses impartiality.	The report contains no general declaration of policy respecting administrative procedure.	None.
Definitions	Defines "rules," "officers," "agency," "independent agency," "circuit court of appeals," "days," "person," "decision," and "controversy."	Defines only "agency" and "agency tribunal."	Defines "agency," "persons," "rules," "adjudication," and "publication."	No discussion.	Defines "rules," "agency," "officers," "lawyer," "circuit court of appeals," "days," "persons," "decisions," "controversy," "publications," and "publicity."
Delegation within agencies.	Authorizes the establishment of boards to hear contested cases "in various sections of the United States" and authorizes the heads of agencies to designate any "person" to approve, disapprove, or modify, for them all decisions of hearing officers.	Authorizes internal delegation of functions except that boards must continue to exercise ultimate authority.	Similar to majority recommendation but requires publication of all delegations and prohibits delegation of authority to hear cases which are actually decided by a superior officer before whom no hearings are held.	The report (pp. 20-24) points out the indispensable need for delegation and decentralization of authority within agencies. Minority of the committee (note, p. 219) stresses need even more strongly.	No specific provision.
Appearances	No provision.	No provision, except that right to use of counsel is recognized in sec. 4.	Right of appearance of parties in person or by representatives specifically accorded.	No discussion in report.	Similar to S. 674 but if proceeding involves question of law or preparation of a record for judicial review, limited to person concerned or his attorney.
Attorneys and agents	Attorneys to be eligible to practice before agencies "unless otherwise prohibited by law."	No provision, except direction for further study of problem in sec. 7 (5).	Power of debarment or suspension, subject to judicial review, is recognized in all agencies; admission requirements for attorneys limited; agencies given additional authority over admission of former employees and other persons.	"It appears to the Committee that members of the bar are subjected to an unjustifiable annoyance in connection with their admission to practice before the agencies" (p. 124).	Similar to minority bill.

I. GENERAL MATTERS

Subject	Walter-Logan bill (H. R. 6324, 76th Cong., 3d sess.)	Measure recommended by majority of Attorney General's Committee (S. 675)	Proposal of minority of Attorney General's Committee (S. 674)	Report of Attorney General's Committee (S. Doc. No. 8, 77th Cong. 1st sess.)	Walter bill (H. R. 3464 and S. 918)
Investigatory powers	No provision	No provision	Prohibits unnecessary disturbance of personal privacy or private occupation; requires simplified reports; authorizes submission of sworn statements; and limits exercise of powers to authorized purposes.	Need for reduction and simplification of reporting is recognized but deferred for further study (p. 126). Need for restraint in investigations is also recognized at p. 114.	Similar to S. 674.
Subpenas	No limitations prescribed.	No limitations prescribed.	Limited to issuance upon "reasonable showing of grounds, necessity, and reasonable scope"; and to be issued to private parties "as freely as to representatives of any agency."	Problem recognized (pp. 124–125, 414–435), but deferred for further study.	[illegible]
Publicity	No provision	No provision, except for further study in sec. 7 (4).	Authorizes agencies to make available certain data; prohibits publicity during "preliminary or investigative phases of adjudication"; and, where releases are issued, provides for "equality of treatment of representatives of the press and other interested parties."	The problem is recognized at pp. 134, 135–136 of the committee report.	Section defining "publicity" states that public releases shall cover the "public documents or portion of all parties * * * in a fair and and equal manner."
Office of Administrative Procedure.	No provision for any similar agency.	Provision for office to study improvement of administrative procedure, to receive complaints, make further studies and investigations, approve appointments of hearing officers and to determine charges against them leading to removal, and to report to Congress annually.	Similar to majority bill, but see first note on p. 223 of committee report.	Establishment of office recommended in ch. VIII, see particularly pp. 123–124. The importance of the office is brought out later in connection with the appointment and dismissal of hearing officers. (See below.)	None.

Enforcement of act	No general provision	No general provision	Provisions of act to serve as guides, limitations, or authority for the persons affected by administrative powers, for administrators in the exercise of those powers, and for the courts in reviewing the exercise of such powers. Disciplinary action is also provided against administrative personnel for violations of mandatory provisions.	The committee, majority, believes that "the report itself" will "serve as a guide to administrators," and that legislation should therefore be limited accordingly (pp. 191–192). A minority of the committee recommends a reasonably complete "legislative statement of standards of fair administrative procedure" (pp. 213–216).	No provision.
Suspension by President	No provision	No provision	For limited period and under certain safeguards, authorizes the President to suspend the operation of any provision of the act as to any agency if found to be "impracticable or unworkable." (See note, p. 224, of report of comm.ttee.)	A majority of the committee disfavors this provision because it would subject the President "to competing pressures for exemption and extension" (p. 192).	Do.
Separability	do	do	Usual provision that invalidity of any part of act shall not invalidate other provisions.	No discussion	Do.
Effective date	No special provision	Rule making provisions to take effect in 30 days; provisions respecting judicial review and rules and regulations to "take effect at once"; all other provisions respecting adjudications to take effect Jan. 1, 1942.	Act to take effect in 20 days, but provisions respecting hearing commissioners not to take effect for "6 months" unless adopted prior thereto by rule of any agency.	do	Do.

II. RULES AND REGULATIONS

Declaration of policy	None	None	Rules to give interested persons all possible information as to administrative organization, policy, law, procedure, and practice; rule-making procedures to be "designed to extend the legislative process by securing the participation of interested parties"; and rule making to be encouraged "in order to reduce to a minimum the necessity for case-by-case administrative adjudications."	See references to the report made below; and see also first note on p. 225 of report.	Similar to S. 674.

II. RULES AND REGULATIONS

Subject	Walter-Logan bill (H. R. 6324, 76th Cong., 3d sess.)	Measure recommended by majority of Attorney General's Committee (S. 675)	Proposal of minority of Attorney General's Committee (S. 674)	Report of Attorney General's Committee (S. Doc. No. 8, 77th Cong. 1st sess.)	Walter bill (H. R. 3464 and S. 918)
Exceptions to act	Excepts numerous independent agencies, boards, and departments as well as specific subjects from all provisions of the bill.	None	National defense and foreign affairs exempted in certain situations.	No discussion	Authorizes agencies to dispense with procedural requirements in emergencies and for noncontroversial and minor amendments to rules. Numerous functions and some agencies (see below) are exempted from the measure altogether, even as to rule making.
Required types of rules	Only "implementing" and "interpretative" rules recognized.	Rules, regulations, and general policies, where adopted, to be made public; in addition, requires statement of internal organization, functions, and duties of every agency.	Requirement that rules be made on (1) agency organization, (2) general policies, (3) matters of substance where expressly authorized by statute, (4) interpretations, (5) practice and procedure, (6) forms, and (7) instructions.	"An important and far-reaching defect in the field of administrative law has been a simple lack of adequate public information concerning its substance and procedure" (p. 25). The first section of ch. II, pp. 25–29, enumerates these 7 types of rules as those which should be made.	Similar to S. 674 but excludes rules of practice, forms, etc.
Form and content of rules	No provision	No provision except for publication.	Mere repetition of legislation prohibited; rules to be kept current and complete; unpublished rules prohibited; direction given as to organization, form, and numbering of rules.	This subject is touched upon on pp. 28–29; suggests desirability of distinguishing between organizational, procedural, and and substantive rules and impropriety of unpublished instructions on policies to agency personnel.	Similar to S. 674 except no direction given as to organization, form, numbering of rules.
Rescission of rules	Penalties not to be imposed for conduct in accordance with any rule until 30 days after published rescission.	No provision	Similar to Walter-Logan bill provision.	No discussion	Similar to Walter-Logan bill.
Formulation of rules	No provision	Agencies directed to fix responsibility for rule making upon designated officers or employees.	Similar, with additional provision that agencies shall also publish the procedures by which they intend to make rules and regulations.	Responsibility for rule-making within each agency in discussed in the committee monographs but not specifically in its report.	Requires agency to formulate rules within 1 year but does not prescribe responsibility for formulation.

Investigations before rule making.	.....do.....	No provision.....	Requires preliminary nonpublic study or investigation in order to "formulate issues or proposed, tentative, or final rules."	Need and practice discussed at pp. 111-114.	Similar to S. 674.
Effective date of rules.....	Upon publication in Federal Register.	Unless a finding that circumstances require shorter time is made, rules not to become effective for 45 days.	Where practicable, effective date to be deferred "to permit comment, the submission and consideration of oral or written criticism or argument and revision or suspension prior to announced effective date."	Discussed and recommended at pp. 114-115.	Similar to Walter-Logan bill.
Notice of rule making.....	Requires at least 10 days' notice of hearings and publication of proposed rules.	No provision.....	Notice required of intention to make rules, of procedures to be followed, and of issues involved.	The general problem of notice is discussed in the report at pp. 101-115 with recommendations for an adequate notice as circumstances permit.	Do.
Public rule making procedures.	Notice and hearing required for making all types of rules.	.....do.....	Agencies given choice of procedures, including (1) the submission and reception of written views, (2) consultations and conferences, (3) informal hearings, and (4) formal hearings; existing provisions of law left undisturbed where special procedures are prescribed; certain minor exceptions made.	These types of procedures are discussed and approved in the report at pp. 101-115, with a recommendation that no rigid legislation is advisable or practicable.	Similar to Walter-Logan bill as to interpretative and substantive rules.
Right of petition.....	Provides for petitions for changes in rules in effect not more than 3 years and for hearings upon such petitions.	Provides for petitions for formulation or amendment of any rule, with a report to Congress on disposition of such petitions.	Provides a right of petition; requires agencies to establish procedures for handling such petitions; and directs that agencies report annually to Congress on disposition of petitions.	No special discussion save as may be implied from the general discussion of rule making.	Permits any person substantially interested to request any agency to issue, amend, or rescind any rule; directs the agency to establish a procedure for handling request.

Subject	Walter-Logan bill (H. R. 6324, 76th Cong., 3d sess.)	Measure recommended by majority of Attorney General's Committee (S. 675)	Proposal of minority of Attorney General's Committee (S. 674)	Report of Attorney General's Committee (S. Doc. No. 8, 77th Cong. 1st sess.)	Walter bill (H. R. 3464 and S. 918)
Judicial review of rules....	Provides for judicial review of rules upon petition of any person "substantially interested"; court to give declaratory judgment holding rule valid or invalid; valid rule must conform to Constitution, the statute under which issued, and be issued only after notice and hearing.	No provision.....	Provision for judicial review of any rule "upon its application to particular persons or subjects, or upon proper application for declaratory judgment"; authorizes declaratory judgment procedure "where the rule, or its threatened application, interferes with or impairs, or threatens to interfere with or impair the rights, privileges, or immunities of any person"; and specifies the scope of review in any contest of rule to include constitutionality, statutory authority, reasonableness, and compliance with procedural requirements.	The committee recognizes the availability of judicial review upon the application of any rule or "in declaratory judgment proceedings" (p. 115), but disapproves of the extension of judicial review upon a record of rule-making hearings either as proposed by the Walter-Logan bill or as now provided in certain special legislation (pp. 115-120). (The Attorney General, in his letter accompanying the veto message on the Walter-Logan bill, stated that "under the Declaratory Judgments Act of 1934, any person may now obtain a judgment as to the validity of such administrative rules, if he can show such an interest and present injury therefrom as to constitute a 'case or controversy.'" A minority of the committee points out, however, that the Declaratory Judgments Act "does not altogether fit the subject and needs some limitation to care for the determination of fact issues, since otherwise the facts in the first instance would be determined through judicial rather than administrative process." See first note at p. 231 of the committee report.)	Combines features of S. 674 and Walter-Logan, except requires exhaustion of administrative remedies before declaratory judgment proceedings in district court for District of Columbia and permits court to take evidence if controversy develops over facts or applicability of rule in lieu of reference back to agency for declaratory judgment as in S. 674.

Rulings	No provision	do	Rulings in specific cases not to be utilized as rules but general principles, policies, or interpretations developed in rulings are to be embodied currently in published rules; and rulings intended to be utilized as precedents are to be published.	No discussion. See second note at p. 221 of committee report.	No provision.
Reports to Congress on rules.	do	Requirement of annual report to Congress on rules made, procedures utilized, and disposition of petitions respecting rules.	Similar to majority bill	Discussed and recommended at pp. 120–121 of the committee report.	Requires report to Congress.
III. ADJUDICATIONS					
Declaration of policy	None	No special declaration governing adjudications.	Declaration of fundamentals as to (1) specific notice; (2) opportunity to present and meet evidence; (3) prompt decision by impartial officers; (4) full relief authorized by law; or no greater penalties than authorized by law, and (5) an opportunity for judicial review.	No discussion of general policy as such.	Similar to S. 674.
Exceptions	Excepts numerous agencies and certain enumerated functions. (See first note on p. 223 of committee report.)	Excepts adjudications made by the [illegible] of the members thereof, rule-making proceedings, military or naval functions, and the appointment or discipline of Government personnel; in addition it is expressly provided that the act shall apply only where a hearing is "required by law" and even then only where adjudications are required "by law" to be made [illegible] of a record made in the course of such hearing."	Excepts (1) adjudications where parties are accorded a right to a subsequent trial de novo in the courts or before a separate administrative agency and (2) functions having to do with foreign affairs, national defense, Government personnel, arbitration and mediation in labor disputes, the fiscal and monetary operations of the Treasury Department, public works, lending or spending, and the procurement or disposition of public property; but applies in all cases where hearings and decisions upon a record are required by law, except where a subsequent trial de novo is available to the parties; and authorizes exempted agencies to treat the act as advisory and to adopt its provisions by rule.	The exceptions recommended by the majority of the committee are discussed at pp. 53–55 of its report, and those of the minority are discussed in the first note on p. 223.	Following subjects or activities are excepted from bill entirely: Foreign affairs; Military or Naval Establishments conduct; functions dealing with governmental employees; fiscal and monetary operations of Treasury and Federal Reserve Board; arbitrations, mediation, or adjustment in the field of labor relations; procurement or disposition of public works, relief, lending, or spending, taxation.

III. ADJUDICATIONS—Continued

Subject	Walter-Logan bill (H. R. 6324, 76th Cong., 3d sess.)	Measure recommended by majority of Attorney General's Committee (S. 675)	Proposal of minority of Attorney General's Committee (S. 674)	Report of Attorney General's Committee (S. Doc. No. 8, 77th Cong. 1st sess.)	Walter bill (H. R. 3464 and S. 918)
Speed of decision	Requires decisions be made within 30 days after close of hearing by intra-agency boards; by independent agencies within 30 days after filing of trial examiner's report.	No provision	General provision for prompt decision, with due regard for the convenience and necessity of private parties.	The matter of slow administrative procedure is discussed in the committee monographs; is touched upon at various points, incidentally, in the report; is treated statistically in Appendix G, pp. 327-374; and is strongly emphasized at p. 61 as one of the "shortcomings of the administrative process."	No provision.
Informal procedures	No provision	Provision that no formal hearing need be held in case the parties default by failing to answer or appear.	Specific authority given agencies to make informal disposition of all cases where parties consent or parties are in default, except where the number of parties prevent informal procedures or the unusual nature and importance of the matter requires formal proceedings.	Complete discussion in ch. III, pp. 38-42, stressing the need for informal procedures and characterizing them as "the lifeblood of the administrative process."	Similar to S. 674.
Declaratory rulings	do	Declaratory rulings authorized, but only in the discretion of the agency concerned.	Parties accorded the right to declaratory rulings "when necessary to terminate a controversy or to remove a substantial uncertainty as to the application of administrative statutory authority or rules, with the same effect, and subject to the same administrative or judicial review or reconsideration as in the case of all other authorized adjudications of the agency."	Discussed and recommended at pp. 30 to 33 of the report.	No provision.
Notice and complaints	No general provision	No provision	Requires notices or complaints to specify issues or charges and, where practicable, suggest additional remedies or procedures available to parties.	The importance of this subject is strongly urged at p. 63 of the report, and is also illustrated in ch. IX at pp. 134, 159, and 177.	Similar to S. 674.

Availability of record.....	Record of proceedings to be filed with agency and copy available to aggrieved party at cost.	.....do.....	Provision that parties, during informal proceedings, shall have access to the record upon which agency has acted or proposes to act.	No discussion.....	Do.
Pleadings	No provision.....	No provision except authorization of further study in sec. 7.	Agencies authorized to require, in lieu of answers, notice of desire to be heard and intention to appear at scheduled hearings.	Some suggestion is made for further study at p. 125 of the report.	Do.
Requirement of formal procedures.	No distinction made between informal procedure by consent of the parties and formal procedure in contested cases.	No definite requirement of formal procedures except where hearings and decision upon a record are otherwise required "by law."	Formal procedures required where there is no informal disposition of cases by consent, except where decisions are made upon the basis of inspections or tests, where statutes authorize summary procedure or emergency action, or where the parties consent to a modification of formal procedures.	There is a discussion of the appropriate area for formal procedures in ch. III, beginning at p. 43. The need of a forum for formal proceedings is stressed at p. 62.	Do.
Segregation of prosecuting and deciding functions.	No specific provision; hearings before intra-agency boards or trial examiners; members of intra-agency boards shall not have participated in particular case or in drafting or approving rule involved.	No provision.....	Requirement of adequate internal separation of agencies officers engaged in prosecuting or investigating cases from those engaged in hearing and deciding cases.	"Commingling of functions of investigation or advocacy with the function of deciding" is held to be "plainly undesirable" and should be avoided by appropriate internal division of labor" (p. 56).	No provision.
Specification of kinds of hearing and deciding officers and nature of their functions	Specifies formal hearings before departmental boards or trial examiners in independent agencies, with appeals to agency head.	Specifies functions and duties of "hearing commissioners" only; does not apply to other hearing or deciding officers.	Lists all types of hearing and deciding officers—agency heads, members of boards, hearing commissioners, etc.—and provides that their "functions shall be judicial in nature," that they "shall be subject to the accepted canons of judicial ethics," and that they shall in all other respects be subject to the act.	No special discussion, except that at pp. 53–54 it is said that "obviously * * * the recommendations (of the majority) do not apply in agencies where the heads themselves hear and decide cases." For the minority view, see note at p. 237 of report.	Provides for formal administrative hearings, specific functions and duties of presiding officers, and for appeals to agency heads.

III. ADJUDICATIONS—Continued

Subject	Walter-Logan bill (H. R. 6324, 76th Cong., 3d sess.)	Measure recommended by majority of Attorney General's Committee (S. 675)	Proposal of minority of Attorney General's Committee (S. 674)	Report of Attorney General's Committee (S. Doc. No. 8, 77th Cong. 1st sess.)	Walter bill (H. R. 3464 and S. 918)
Subordinate hearing officers.	No provision other than above.	Provision for appointment, upon the recommendation of the agency concerned by an independent Office of Administrative Procedure and removal only for cause after hearing before a similarly independent tribunal; tenure of 7 years at a fixed salary; similar provision for appointment of "provisional" hearing officers for 1 year; provision for appointment of "temporary" hearing officers by a "director" alone; provision for the loan of hearing officers by one agency to another; provision for "chief" hearing officers in agencies having more than five hearing commissioners.	Similar to majority bill, except (1) omission of authority for appointment of "temporary" hearing officers, (2) omission of provisions for "chief" hearing officers, (3) a more flexible salary scale to be adjusted by the independent appointing authority with a prohibition of agency control over salaries, (4) longer tenure, and (5) authority for reappointments by the independent board without the intercession of the agency concerned.	Discussed and recommended at pp. 46-50. See also note at p. 239, explaining the minority changes. One member recommends that subordinate hearing officers be appointed by an independent agency without the recommendation of the agency concerned and that such officers be assigned to no agency but merely be assigned by the independent appointing board" to the hearing of cases as the needs of the agencies require" (p. 250).	Presiding officers to conduct formal hearings outside Washington to be appointed by appropriate United States District Court, I. C. C., and Patent Office proceedings excepted.
Disqualification of hearing officers.	No provision except members of intra-agency boards having previous participation in case or making of rule involved.	Provision for filing of affidavit of disqualification, to be acted on by a "chief hearing commissioner" in each agency, and the ruling to become a part of the record.	Similar, but affidavit to be passed upon by agency head.	No discussion	Presiding officer may withdraw if he deems himself disqualified. No disqualifying procedure.
Powers of hearing officers.	Provision for administration of oaths and issuance of subpenas.	Provision for administration of oaths, issuance of subpenas, taking of depositions, regulation of hearings, admission or exclusion of evidence, and rulings upon questions and cross-examination.	Similar to majority provision	Discussed at p. 50	Similar to S. 674.

Enforcement of order and process.	Provision for judicial enforcement of orders as for contempt.	Similar.	do.	No discussion.	Similar to S. 675.
Prehearing conferences.	No provision.	Provision for prehearing conferences to simplify *issues*, arrange stipulations, limit number of witnesses, etc.	do.	Fully discussed and recommended at pp. 64–68.	Do.
Rules of evidence.	do.	Provision empowering hearing commissioners "to exclude evidence which is immaterial, irrelevant, unduly repetitious, or not of the sort upon which responsible persons are accustomed to rely in serious affairs."	Provision for the application of "the basic principles of relevancy, materiality, and probative force as recognized in Federal judicial proceedings of an equitable nature," but broadly interpreted to effectuate administrative powers and legislative policy and applied so as to assure that "testimony of reasonable probative value" will not be excluded.	"The committee, within the limits of its resources, has found no general pattern of departure from the basic principles of evidence among administrative agencies" (pp. 70–71).	Similar to S. 674.
Cross-examination, written evidence, depositions, stipulations.	Recognition of right of cross-examination.	Further study authorized in sec. 7 (4)	Recognition of right of cross-examination in all cases; authorization of reception of written evidence, depositions, and stipulations.	Written evidence practice discussed and approved at p. 69; stipulations encouraged at pp. 67–68; desirability of facilitating cross-examination recognized at p. 70.	Permits reasonable cross-examination, as a matter of right.
Official notice.	No provision.	No provision.	Official notice authorized, upon condition that parties be apprised of matters so noticed and afforded an opportunity to show erroneous official notice.	Discussed at pp. 71–73 and recommended, provided parties are apprised of matters so noticed and afforded an opportunity to show erroneous notice.	No provision.
Findings, arguments, briefs.	do.	Provision for submission of findings, briefs, and argument.	Similar provision, plus requirement of findings and recommendations by hearing officer where case is taken up by agency head prior to decision.	No discussion.	Similar to S. 674.
Official record.	To be made available to aggrieved parties.	No provision.	Provision that record shall be made available to all parties, upon which decision shall be made to the exclusion of all other material except briefs and proper matters of official notice.	do.	No provision.

III. ADJUDICATIONS—Continued

Subject	Walter-Logan bill (H. R. 6324, 76th Cong., 3d sess.)	Measure recommended by majority of Attorney General's Committee (S. 675)	Proposal of minority of Attorney General's Committee (S. 674)	Report of Attorney General's Committee (S. Doc. No. 8, 77th Cong., 1st sess.)	Walter bill (H. R. 3464 and S. 918)
Decisions	Requires decisions by subordinate officers after "full and fair hearing," but requires automatic review of all decisions by agency heads, except where party consents to entry of decision of trial examiner.	Provision for decision by hearing commissioner, with written findings and conclusions but no opinion unless requested by the parties; authorization for hearing commissioner to certify questions to agency head for instructions before decision; provision for agency to take the case up prior to decision of hearing officer, upon the petition of a private party; and provision that such decisions become final and binding in the absence of appeal to or review by the agency head.	Requirement of decision by any presiding officer, with written findings, conclusions, and mandatory statement of reasons; similar provisions for certification of cases or removal to agency head upon petition of private parties; requirement that deciding officers personally master the relevant portions of the record, with no more than clerical aid; requirement of service upon the parties; requirement as to scope of findings and their relevance to the decision rendered; provision for the publication of decisions in bound form; and similar provision for finality in the absence of appeal to or review by the agency head.	Discussed and recommended in ch. IV, p. 43 and following; see particularly p. 52.	Similar to S. 674.
Review by agency head	See immediately above. Requires, in some cases, review by the agency head without opportunity for the private parties to appear and participate in such review proceedings; in other cases review by agency required after notice and hearing upon exceptions filed to proposed decision of examiner or the agency itself.	Provision for review by, or appeal to, the agency head respecting the decision of any hearing commissioner.	Similar to majority provision, except where agency head reviews a case upon its own motion it is required to state the issues or points upon which the review is to be had.	Discussed and recommended in ch. IV, particularly at pp. 51–52, 53.	Do.

Rehearings, reopenings, etc.	Provision for rehearings....	Provision for reopening to same extent as other decisions.	Similar to majority.....	See ch. IV, generally.....	Decisions subject to reopening upon basis of mistake or upon new and material evidence.
Sanctions and benefits....	No provision.....	No provision.....	Powers to be exercised only upon final adjudications; penalties to be limited to those authorized by law; benefits to which parties are entitled not to be diminished or withheld; and imposition of sanctions to be deferred, where practicable, to permit parties to adjust private affairs or seek review.	No discussion.....	Similar to S. 674.
Judicial review.....	Provision for uniform review procedure before circuit courts of appeals with scope of review such as (that now prevailing by judicial) interpretation.	No provision except for the printing of records on appeal and for the transfer of cases brought in the wrong court or the amendment of pleadings where the remedy is misconceived.	Confers a right of review upon "any person adversely affected" by an administrative decision; contains a provision (similar to majority bill) respecting transfers or amendments in case the party seeking review has taken his case to the wrong court or adopted the wrong procedure; defines reviewable orders; sets forth the presently existing scope of review; and contains a provision (similar to majority bill) for the simplification of records on appeal.	Ch. VI, pp. 75-95, treats of the entire subject by discussing the technical grounds, bases, and scope of review, and concludes that the reorganization of the hearing and decision process set forth above "will obviate the reasons for change in the scope of judicial review" (p. 92). The minority urge (1) congressional reexamination of the review provisions respecting each agency and (2) the statutory statement of the general availability and scope of review (pp. 209-212). One of the minority also recommends that, where an agency head disagrees with the findings of the officer who heard and decided the case in the first instance, the courts be authorized to review the case upon their "own impressions of the weight of the evidence" (p. 250).	Provides for uniform review procedure. Scope of review similar to that contained in S. 674.
Rules and regulations to carry out act.	No provision.....	Each agency authorized to make rules and regulations to carry out the measure proposed.	No provision.....	No discussion.....	No provision.

AMERICAN BAR ASSOCIATION

ST. LOUIS, MO., *April 10, 1941.*

HON. CARL A. HATCH,
Senator From New Mexico,
Member, Senate Judiciary Committee,
Washington, D. C.

DEAR SENATOR HATCH: I am enclosing for you herewith a copy of a resolution relating to the subject of administrative procedure, prepared by the board of governors of the American Bar Association, and adopted by its house of delegates at the midyear meeting held in Chicago March 17-18, 1941.

The resolution endeavors to state those principles which the association believes should be incorporated in any bill to be enacted upon the subject. It was the opinion of the board of governors and the house of delegates at the time that Senate bill 674 was the one among those pending in Congress which seemed the most nearly to embody those principles. It may be that some better expression of the stated principles, or some of them, will appear in some other bill or in some suggestion or modification of the pending measures. If so, the association would support it.

I am venturing to supply you with this information in this direct manner because I want you to know about it, and for the reason that some of the current news publicity upon the subject of the attitude which the house of delegates assumed at Chicago seemed not to have reflected a correct understanding of the meaning of the action taken.

With great respect, I beg to remain,

Very sincerely yours,

JACOB M. LASHLY.

ADMINISTRATIVE LAW

The board of governors transmits the report of the special committee on administrative law. It concurs in and approves the statement of principles contained in the report, with three modifications. The board believes that the resolution should state these principles instead of incorporating them by reference. It therefore recommends that the following resolution be adopted in lieu of that recommended by the committee:

"*Resolved*, That the house of delegates of the American Bar Association notes with satisfaction the reports by the Attorney General's Committee on Administrative Procedure, which strongly confirm the need for early enactment of remedial legislation along lines heretofore urged by this association; further

"*Resolved*, That the house of delegates hereby approves the following statement of principles which should be reflected in any bill enacted for the improvement of Federal administrative procedure:

"1. *Completeness.*—A short but complete statement of the fundamentals of the whole administrative process, including clear declarations of policy;

"2. *Rules and regulations.*—In connection with administrative regulations: (*a*) The specification of required types of administrative rules; (*b*) a statutory enumeration of methods of rule making to be adapted to different kinds of rules and situations, and designed to secure the participation of all interested parties in the rule-making process, including formal notice and public hearing if requested, and practicable preliminary to the issuance of interpretative or substantive law rules; (*c*) a recognition of a right of petition in connection with the making and modification of rules, and (*d*) clear provision for judicial review both upon recognized principles of declaratory judgment or in cases of actual controversy.

"3. *The adjudicatory system.*—In connection with administrative adjudication: (*a*) The segregation of prosecuting and judicial functions in the administrative process; (*b*) a requirement that adjudications be expedited in order to secure the prompt relief of private parties; (*c*) a definition of the duties of officers who may preside at administrative hearings; (*d*) declared standards of fair and impartial procedure; (*e*) provision for the independent selection of administrative hearing officers, other than the heads of agencies, designed to secure their independence of judgment; (*f*) a statement of the applicability of the basic principles of evidence, together with a recognition of the right of cross-examination; (*g*) provision that decisions shall be made by the administrative officers who heard the case in the first instance (subject to review by superior administrative officers), and that all deciding officers shall confine their consideration to the record, shall

personally master the pertinent parts of the record, and shall not rely upon outside aid (other than clerical) in the performance of this function; and (h) adequate requirement of the making of findings and conclusions, and the statement of reasons for decisions."

The foregoing standards should be placed within a legislative framework which requires (a) adequate and specific notice in all cases, the simplification of responsive pleadings, and the availability of declaratory rulings in all cases of threatened action or controversy; (b) a statement of unmistakable authority for the informal disposition of uncontested cases, coupled with a requirement of formal procedures in all cases where private parties demand them; (c) the limitation of sanctions or penalties to those authorized by law; and (d) a clear statement of the procedure for judicial review and an adequate scope thereof, together with provisions which will simplify and decrease the cost of such review.

"(4) *General provisions.*—In connection with all administrative proceedings: (a) Provision for the proper delegation and decentralization of authority; a definitely stated right of appearance and representation of parties; and the simplification of the admission of attorneys or others to practice before administrative agencies and (b) appropriate limitations upon investigatory powers, the issuance of subpenas, and administrative publicity.

"(5) *Exceptions.*—The exception of purely executive functions which do not lend themselves to formal procedures, such as lending, spending, national defense and similar types of governmental activity.

"*Resolved*, That the house of delegates expresses the opinion that Senate bill 674 (which was drafted by the minority of the Attorney General's Committee) is the bill which up to this time best embodies the above statement of principles; and further

"*Resolved*, That the enactment into law of legislation embodying these principles is of great public importance and that the association lend every effort in aid thereof."

MARCH 17, 1941.

STATEMENT OF ROSCOE POUND

At the request of Mr. Lashly, president of the American Bar Association, I am asking to submit this statement in support of the statement of principles adopted by the house of delegates of the American Bar Association set forth in the statement of Mr. Lashly made before the committee on May 27, 1941.

In that statement and in the reports made by the Attorney General's Committee, questions are involved much further reaching than what shall be enacted as to this or that Federal administrative agency. There has been a rapid development of administrative agencies throughout the English-speaking world. In all countries certain tendencies of these agencies have been manifest, partly arising from their being manned largely by laymen with no experience of the problems of determining facts while safeguarding individual rights, partly from zeal to exercise powers committed to them leading them to see only or chiefly the immediate purposes of those powers and assume that other considerations are negligible, and partly from the tendency of bureaus, in all experience, to develop methods which have earned them the title of bureaucratic. These tendencies have been given impetus in the United States by the increasing currency, especially in our institutions of learning, of ideas imported from abroad as to the disappearance of law in an ideal society, as to a politically organized society in which there is to be no law but there are only to be administrative ordinances and orders, and as to a "public law" which is to supersede the "coordinating law" which treats all persons as equal before the law, is to put the official on a higher plane than the individual, and is to allow subordination of the rights of some to the claims of others at the discretion of the officers of government. Under such teaching, law is whatever is done officially, not something to which official action is to be held to conform. It is urged that the separation of powers was a mere fashion of eighteenth-century political thought and is something outgrown.

We do not always realize how it came about that on the morrow of the Declaration of Independence most of the Colonies, and all of them within 4 years thereafter declared the separation of powers the very basis of their frames of government, and thereafter every new State put the separation of powers at the foundation and a bill of rights in the forefront of its construction. In

the seventeenth and eighteenth centuries, down to the Revolution, the colonists had lived under a regime in which there was a complete centralization of governmental power in the privy council. It had a veto on all colonial legislation, it controlled administration through instructions to the royal governors, it was the ultimate court of appeal from the colonial courts. Likewise in the colony there was a like centralization of power in the Governor and Council. Experience of what this centralization of all the powers of government in one body meant in action was behind the unanimous judgment of Americans in our formative era that no such thing should be tolerated in the governments they were setting up for themselves. Those who argue, as is done today, that all the powers of politically organized society should be reposed in an "administrative department" ignore this experience.

As has been said, certain tendencies of administrative agencies are to be seen in all lands. They are by no means confined to Federal administrative agencies. Some examples drawn from the latter may be found in the Report of the Special Committee of the American Bar Association on Administrative Law (63 Rep. Am. Bar Assn. 346-351 (1938)). Let me give some more, gathered at random from running over the last published law report in nine States—all I could look at in the time at hand.

One of the commonest and most violative of rudimentary canons of justice is a tendency to make determinations without a hearing or without hearing both sides. This is apt to characterize determinations by laymen who have not learned by experience that there are two sides to all controversies. Examples from the latest law reports are: *Central Bus Operators Inc.* v. *Central Ave. Bus Owners' Assn.* (128 N. J. Eq. 177 (1940))—deprivation of a substantial property right without affording an opportunity to be heard in defense thereof; *Wolgamut* v. *Vinegar Hill Zinc Co.* (151 Kan. 374 (1940))—order made without notice to party affected; *Matter of Lipschitz* v. *Mealey* (259 App. Div. (N. Y.) 640, 642 (1940))—taking testimony of two witnesses in absence of the party affected and without any opportunity on his part to cross examine; *Darby* v. *Southern Railway Co.* (194 S. C. 421, 441 (1940))— Public Service Commission held bound to have a hearing before exercising discretion as to what type of service to require a railroad company to render; *Atchison, T. & S. F. R. Co.'s Protest* (44 N. M. 608, 614 (1940))—decision on a partial hearing. Very recent cases involving federal administrative agencies are: *Scripps Howard Radio Inc.* v. *Federal Communications Commission* (U. S. Ct. App. D. C. Feb. 3, 1941)—orders injuriously affecting valuable rights made without hearing the parties affected and application for hearing thereafter denied; *Broun Radio Service and Laboratory* v. *Federal Communications Commission* (U. S. Ct. App. D. C. Feb. 3, 1941)—see the arbitrary denial of hearing set forth in note 1 to the opinion of Stephens, J.

An example of how laymen are likely to proceed in this way may be seen in *Brooks* v. *Engar* (259 App. Div. (N. Y.) 333 (1940))—expulsion of a member of a voluntary association on the testimony of a witness whose identity and testimony was withheld from the member expelled.

A closely related tendency is to make determinations upon the basis of consultations had in private or of reports not divulged, giving the party affected no opportunity to refute or explain. Cases in the last reports are: *Matter of Smith* v. *Rosoff Tunnel, Inc.* (259 App. Div. (N. Y.) 617, 619-620 (1940))—acting upon a private consultation of the medical staff, said by the court to be "a gross impropriety and a proposed method of handling a disputed question of fact which would preclude the claimant from the right of cross-examination"; *Wallace* v. *North Dakota Workmens Compensation Bureau* (69 N. D. 165, 169-170 (1939)). In that case, the bureau having terminated an award, the claimant applied for opportunity to oppose the termination. The bureau was unwilling to allow the papers to be examined. The supreme court by mandamus required the bureau to allow the claimant to examine all the files and records on which it based its decision. This was opposed by the bureau. The court said: "It is within the contemplation of the law that the order or decision of the bureau shall be based upon some record and the results of investigations must be reduced to record form. There cannot be such confidential reports affecting the claimant's rights that the bureau may use as a basis for denying his right without giving him an opportunity to combat it if he can. That would be, in essence, a denial of justice."

Even more serious is a tendency to make determinations injuriously affecting individual rights without a basis in evidence of rational probative force. For an example, in current decisions I may cite *Taylor* v. *Cornett Lewis Coal Co.* (281 Ky. 366, 368 (1940)). The court said: "It is perfectly obvious that that which was

accepted by the board in this manner to be evidence was no evidence at all. * * * The mere statement of the manner in which the report was made and its contents demonstrate that it was in nowise evidence against the company and did not justify the board in denominating something as evidence that was not in fact any evidence at all." The question was whether an employee had accepted the provisions of a statute. His name was not on the register of those who had accepted, but a report of the accident was made to the board upon its repeated insistence, in which it was positively stated that the employee had not accepted. On the basis of the employer's having reported the accident the board found the employee had accepted the provisions of the statute. The reports are full of such cases.

A tendency no less widespread but much more difficult to reach by judicial review under the statutes of today is one to set up and give effect to policies beyond or at variance with the statutes or the general law governing the action of the administrative agency. It is very easy to say that the public interest demands or justifies acting beyond or in contravention of the statute and to cover this up by a general pronouncement upon the case. Usually this is done out of zeal to promote social ends to which the legislative body might or might not agree. It involves a degree of legislative power in administrative agencies which is not given them and ought not to be given them even if we departed from the constitutional separation of powers. For these agencies are free from the checks which are imposed on legislative lawmaking and on judicial finding and interpreting of law. Late examples from the current reports are: *Matter of Dusinberre* v. *Noyes* (259 App. Div. (N. Y.) 582 (1940))—deciding on a policy not committed to the administrative agency and contrary to the provisions of the statute defining its powers: *Motsinger* v. *Perryman* (218 N. C. 15, 21 (1940))—an attempt to create liability where the law imposed none; *In re Atchison, T & S. F. R. Co.'s Protest* (44 N. M., 608, 613 (1940))—exercise of powers not given; *Puhl* v. *Pennsylvania Pub. Util. Commission* (139 Pa. Super Ct. 152, 158 (1939)). In the last case a permit was refused to a partnership composed of two married women because the business was managed by the husband of one of them. The commission held they were not bona fide operators. The court called this an "unsubstantial reason." The wives had inherited the money and wished to control it but to leave the details of management to the husband of one. The court held that the commission sought to impose conditions not warranted by the statute.

That these tendencies of administrative determination are not a matter of occasional sporadic cases but represent an inherent characteristic of lay administration of justice is shown by the number of cases to be found in the reports in all jurisdictions. It will be noted how many were found in the one volume (259 App. Div.), covering March to August 1940. Such things call for effective judicial review and explain the attitude of the American Bar Association, whose members have daily experience of what those tendencies in action mean to their clients.

Some other matters set forth in the statement of the house of delegates call for a few words.

As to proposition 3 (a), see *Matter of Joyce* v. *Morgan* (259 App. Div. (N. Y.) 630, 635 (1940)) where the court notes the effect of the administrative agency's acting as investigator, prosecutor, advocate before itself, and judge.

As to proposition 3 (b) see an admirable statement in the opinion of Stephens, J. in *Saginaw Broadcasting Co.* v. *Federal Communications Commission* (96 Fed. 2d, 554, 559-560).

As to proposition 2, see *Darby* v. *Southern R. Co.* (194 S. C. 421, 440 (1940)). There a rule of a public service commission was held by a divided court to apply a power given by one section of a statute to a matter governed by a different section. Rules of such doubtful validity ought not to hang over enterprises to await determination in litigation after action contravening them. Parties should not be required to run the risk of infringing rules having the force of law in order to find out what their rights are under the law. Every reason for the practice of declaratory judgments, now so generally adopted everywhere, applies to ascertainment of the validity of administrative rules in advance of infringement of them.

It should be observed that the tendencies of administrative justice to which the profession objects became manifest specially under the regime of national prohibition. Those who were in charge of administration of the National Prohibition

Act felt strongly that the objects of that act were of such paramount importance as to justify extralegal measures and overriding of individual rights and constitutional guaranties—in short, a subordinating law. Down to the National Prohibition Act there was relatively little complaint of arbitrary administrative action. The pioneer Federal administrative agency had its beginning under the guidance of a great common-law judge, the author of a classical text on constitutional limitations, and long set an excellent example. Since prohibition the zeal of those who exercised administrative powers under the statute has infected those charged with carrying out other laws which they no doubt feel of paramount importance, justifying the means by the end. This feeling has been furthered by the doctrine of disappearance of law and its corollaries, by ideas of so-called legal realism, and by the spread of institutionalism and totalitarianism and kindred teachings in political theory. All these things have worked with the national tendency of those entrusted with wide powers with no traditional technique of using them to exercise them even beyond the appointed limits. Zeal to carry out certain purposes may blind those who see only those purposes to other matters of which the law must take account.

Moreover, the phenomena above discussed are not confined to administrative determination. Our appellate courts have had to repress some of these same tendencies where wide administrative powers are given to lower courts, especially to single judges in new types of court with large grant of discretion See *Interdiction of Scurto* (195 La. 747, 750, 751 (1940))—judge acting on supposed personal knowledge in appointing a guardian without notice or hearing; *Bestel* v. *Bestel* (153 Ore. 100, 110 (1936)). The law is careful to provide a series of checks upon such judicial administration and to afford the fullest review by a bench of judges. Where a lay administrative tribunal subject to few or no checks acts, the reasons for effective review by an appellate bench are compelling. Note how insistent we are in insuring the utmost fairness and scrupulous preservation of the rights of parties in judicial justice. To give a recent example, failure of a trial court to offer to appoint counsel for one accused of a grave crime and to notify him of his right to have counsel appointed, is held a basic and fundamental error striking at the fairness and justice of the whole trial. *Johnson* v. *Zerbst* (304 U. S. 458 (1938)); *Com.* v. *Smith* (139 Pa. Super. Ct. 357, 368 (1939)). Disregard of fundamental guaranties of fairness which courts regard as vitiating a trial so that the sentence can be attacked collaterally ought to have at least the effect of allowing a direct attack by appeal in the case of quasi-judicial administrative determinations, and there should be effective, adequate, and simple procedure for asserting this invalidity. Things which, as Mr. Justice Black puts it, are contrary to the "rudimentary demands of justice," ought not to be tolerated in the name of efficiency or of progress. See *Johnson* v. *Zerbst* (304 U. S. 458, 467).

Courts of first instance often err in the application of law notwithstanding the judges are learned in the law. We provide carefully for review and correction of such errors in appellate proceedings in courts of review consisting of a bench of judges. The records show exactly on what basis everything was done and there is the fullest argument of every point. There is no less need that errors of application of law made by bureaus and commissions made up of officials not learned in the law should be reviewed and corrected. The reports are full of cases of erroneous application of statutes by administrative agencies, and unless these agencies, as some enthusiasts seem to urge, are to be above the law or whatever they do, as others argue, is to be law because they do it, effective judicial review is demanded. But the modes of review provided by statutes, differing often for each agency, make review in many cases difficult to obtain and operate to render review beyond the reach of many whose interests are injuriously affected. This is common knowledge among lawyers, and it is this knowledge that has led bar associations to urge a simple uniform procedure for review. As has been seen, this matter is wider than one of only Federal concern. A wise Federal statute, affording a model for State legislation, would be a long step forward in our administration of justice.

For examples of statutory limitations of review, see *Brown Radio Service & Laboratory* v. *Federal Communications Commission* (U. S. C. A. D. C. Feb. 3, 1941)—statute providing no power of review because of injury to private interests, but only where there was injury to public interest: *Scripps Howard Radio, Inc.* v. *Federal Communications Commission* (U. S. C. A. D. C. Feb. 3, 1941)—

statute precluding stay of orders made without a hearing which injuriously affected valuable rights.

We are told by some that administrative procedure should be left to develop by a course of administrative decision and experience of each agency, and the measures advocated by the American Bar Association have been compared to elaborate codes of legal procedure. No lawyer doubts that the details of administrative procedure should develop out of experience as the details of judicial procedure should. But there are certain fundamentals of just procedure which are the same for every type of tribunal and every type of proceeding. Lawyers are not seeking to tie administrative agencies down by a mass of detail, as many courts were tied down by statutes and codes a generation ago. What they seek is to assure the basic requirement of just determination of facts and sound application of law.

Nor is there any real point in what is said frequently about the great variety of administrative agencies and of the subjects committed to them. There is no variety in the characteristics of administrative determination which call for the safeguard of effective judicial review. There is something to learn from the history of judicial review of proceedings in the courts. In the beginning there was a tendency to have a distinct type of review for each type of judicial proceeding. In an action at law there was once a distinction between application for a new trial and bill of exceptions followed by writ of error. There was error at law, appeal in equity and admiralty—not the same procedure, however, in both—appeal with retrial to a jury in cases in inferior courts, and certiorari for proceedings not according to the course of the common law. There were resulting difficulties and complexities and technicalities which we have been eliminating for a generation. Now we are coming to a simple appeal for all cases calling for review. Administrative law has been going through a like development. We ought by this time to have learned that a simple uniform procedure for review can be adapted by rules of court to every sort of case.

A few words will dispose of the bogie of an intolerable burden cast upon courts if judicial review such as the American Bar Association program calls for is provided. It does not mean that every Federal administrative proceeding with which anyone is dissatisfied will be heard de novo in court. One might as well say that appealability of final judgments at law entails hearing de novo of every case brought in the courts of first instance. Only a small proportion of judicial proceedings, in which there is ground of appeal, is taken up. As to administrative determinations, where the aim is only to insure fundamentals, without substituting discretion of court for that of administrative agency, the proportion would be much smaller. But it should be noted that appealability of its decisions is a great check upon a tribunal. When an effective proceeding is available for review, adequate to protect the essentials of a just procedure and the guaranteed rights of individuals affected by administrative orders, the cases of methods and courses calling for review will greatly diminish. The cases which will go to the courts, except in rare instances, will be cases involving the interpretion and application of statutory provisions.

As to the views of lawyers upon this subject, see the report of the committee of the State Bar of Texas (4 Tex. Bar Journal, 362 (July 1941)).

Four points are above all to be insisted on:

(1) That both sides and all persons injuriously affected be heard fully before orders and determinations are made against them.

(2) That nothing which is used as the basis of an administrative determination adverse to a party's interest be withheld from the record or from scrutiny of a party affected so as to deprive him of full opportunity to explain or refute it.

(3) That whenever determinations are made injuriously affecting individual rights, findings of fact and a record showing fully and clearly on what they are based be required so as to make review possible and effective to insure that the findings have a basis in evidence of rational probative force.

(4) That a simple procedure be provided by which orders and determinations may be reviewed to determine whether there has been a full hearing of all sides, whether the facts in dispute necessary to a decision have been found, whether the findings have support in evidence of rational probative force, whether the order or determination is in accord with the statute governing it, rightly interpreted and applied, and whether the administrative agency has applied according to law the standard committed to it by statute or has applied a different one (perhaps of its own making) or has acted upon no standard.

We are often told that the attempt to give constitutional guarantees some real efficacy is an attack upon administrative tribunals by lawyers who are not

reconciled to their existence and is one of repeated efforts by a combination of lawyers who desire to have all processes of government conducted through lawsuits and of interests which desire to escape regulation. But the question is not whether administration shall be constrained to due process of law. According to the constitution it is so constrained. The question is whether that constraint shall be made available to all who need to invoke it or shall remain generally inaccessible except to the litigant of exceptional means. It cannot be an attack upon these tribunals to believe that they can operate, as all other governmental agencies do, within the limits of due process of law and that they can apply the law laid down for them by Congress and the policies prescribed for them by statute instead of being free to make their own or proceed without any. If these tribunals can only act effectively by acting without law we shall have to remake our whole policy. Indeed, some of the advocates of administrative absolutism concede this and one at least argues for a fourth department of government, the administrative, in which all the powers of government, legislative, executive, and judicial are to be reposed. This is at any rate an honest program of subjecting us to the uncontrolled action of bureaus and boards and commissions.

It cannot be repeated too often. Lawyers who believe that constitutional guarantees ought to be made effective against adminisrative action have no thought of doing away with administrative agencies or cutting down their lawful powers or hampering them in the exercise of discretion committed to them. But there are other things in our policy to be considered besides these agencies. A fundamental idea of our policy is one of balance. The balance between efficient operation of these agencies and securing of individual rights is quite as important as the aims of the several agencies, unless, indeed, we hold, as do some of the proponents of administrative absolutism, that rights are an obsolete archaism and that individual rights are negligible in these connections.

STATEMENT OF DEAN JOHN H. WIGMORE

NORTHWESTERN UNIVERSITY SCHOOL OF LAW,
Chicago, Ill., May 28, 1941.

SENATE JUDICIARY COMMITTEE,
United States Capitol Building,
Washington, D. C.
(Attention of Mr. Dix W. Price, Clerk.)

DEAR SIR: Replying to your telegram of May 26, inviting me to submit a written statement on the administrative procedure bills, I was laboring under a siege of influenza at the time of the publication of the Attorney General's report, and I have since then not had time to study them. However, I have read summaries of the report and articles about it. On only two or three points involved do I have personal convictions based on experience. I am satisfied to be classed as accepting the views expressed at the January meeting of the American Bar Association by Mr. Arthur Vanderbilt, in whose mature experience and judgment upon this subject I have entire confidence.

Yours very truly,

JOHN H. WIGMORE.

STATEMENT OF WILLIAM DRAPER LEWIS, DIRECTOR, AMERICAN LAW INSTITUTE

PHILADELPHIA, PA., *June 30, 1941.*

Hon. CARL A. HATCH,
Chairman, Subcommittee on the Judiciary,
United States Senate, Washington, D. C.

MY DEAR SENATOR HATCH: There have come to my attention three bills—S. 674, S. 675, and S. 918—dealing with the procedure of administrative agencies, and introduced by you on your own behalf and on behalf of Senator Van Nuys. It is my understanding that hearings before your subcommittee have been in progress on these bills since early April.

These three bills present fundamentally divergent approaches which I find of great interest, and upon which I am taking the liberty of submitting some

brief comments. Concerning their details, time, space, and lack of the necessary intimate knowledge preclude helpful observations by me. I am concerned, however, and I shall address myself to the differing bases underlying S. 675 on the one hand, and S. 674 and S. 918 on the other.

That my remarks may be in their proper setting, I might profitably record my recognition and conviction, first, that the administrative process is a vital instrument of effective democratic government, and, second, that neither logically nor inherently should or need it be immune from legislative control. It is axiomatic that Congress has, almost from the beginning, resorted to the administrative process as a flexible and useful method of effectuating some particular public policy. Increasingly complex social and industrial problems have called for increasingly active Federal action, but the very dynamics of the problems required dynamic machinery for their solution.

Yet it is, I believe, foolish to regard administrative agencies solely as regulating agencies. Some, such as the Railroad Retirement Board, the Social Security Board, and the Veterans' Administration are most clearly "benefactory," even in the narrowest sense of the word. But even such agencies—more often thought of as regulatory——such as the National Labor Relations Board, or the Securities and Exchange Commission, or the Federal Trade Commisison, are concerned with more than mere policing. For each employer, or issuer of security, or advertiser, whom these agencies "regulate," there are vast and sometimes unidentifiable numbers of employees, or investors, or consumers who are benefited and protected. For the public interest always looms uncommonly large in administrative proceedings.

Cast in these terms, it is, I feel, unsound to proceed on a basis which assumes that the only two rights involved are those of the agency as against trose of the particular employer, or security issuer, or advertiser. For we cannot properly envisage these agencies as malicious giants engaged in unqual battle with some single and helpless individual. Legislation cannot proceed on the assumption that this is the true picture and that the necessary approach is to curb the agency solely that the "struggle" may be more equal. If that is done, the third party—the public interest—is shifted out.

But this does not mean that no legislation relative to administrative procedure is desirable or possible. Indeed, the particular individual citizen involved should and must be assured of fair and conscientious treatment. While the complexity of the problem, and its infinite facets, call for skepticism relating to comprehensive legislation, they do not require surrender on that score. A measure of control, a measure of uniformity, a measure of restriction and bal ce are, I believe, deisrable. And I believe that the intensive studies whic. have been made by your own subcommittee, by the Attorney General's Committee on Administrative Procedure, and by other private and public groups, have at last brought investigation and knowledge of the administrative procedure to that stage of maturity where legislation is possible. I think that the study of administrative procedure has at last reached the point where difficulties can be isolated and the administrative process can be affirmatively strengthened.

But I cannot agree that the approach which seems to underlie S. 674 and S. 918 are feasible.

I reach this conclusion simply because I believe that, certainly at the present, administrative procedure cannot be codified. S. 674 is called a Federal Code of Administrative Procedure, S. 918 incorporates its general outlines and a great many of its details. The authors of S. 674 analogize it, erroneously I believe, to the Code of Judicial Procedure, which differs markedly in substance and in compass.

When it is recalled that procedure is simply the tool of substance—the method whereby legislative policies are to be effectuated—the tremendous difficulty of procedural codification will be realized. The fields as I have stated are dynamic. Flexibility and expedition are prerequisites. The tasks before the agencies range from simplification and integration of vast holding-company systems through revocation of seamen's licenses for intoxication and to payments for unemployment. That different procedures for these many activities are necessary needs no underscoring. Yet two of the bills before you, S. 674 and S. 918, undertake a detailed legislative code, commanding, exhorting, and suggesting for every step of procedure and to almost all minutiae.

As director of the American Law Institute, which has been intensively engaged in restatements of various fields of the common law, I can assure you that restatement—much less codification—is an immense and laborious task.

We have been at this undertaking for almost two decades. Our task is not finished.

The experience over centures of common law, with its gradual interpretation, evolution, and crystallization, makes possible now only the beginnings of restatement. A priori, the difficulty of codification of administrative procedure, amounts in my opinion to impossibility of successful achievement.

Much the same factors lead me to be skeptical of the "code within a code" provisions of S. 674 and S. 918. These provisions are those appearing in the rule-making titles of those two bills which propose a legislative preference for rule making over the case-by-case method.

I am unable to determine the precise extent to which these two bills go in this respect. At best, they simply declare a legislative hope. At worst, they involve an absolute compulsion, rigidly requiring the reduction of all administrative policies to rule form before the agency can act in a particular case.

I need not dwell long on the utter impracticability of so extreme an interpretation. No court, legislative body, and so, of course, no agency, can foresee the endless permutations of human conduct which are possible. No body could act effectively if it were forbidden to act at all unless it had already declared itself on the precise situation.

But even assuming that S. 674 and S. 918 do not go to such extreme lengths, I cannot help questioning the strong suspicion of their authors on the subject of the case-by-case method. The case-by-case method of adjudication is, after all, the very genius of our law. It is the very method whereby our law can keep pace with our ever-changing needs and demands and conditions. An over-all pattern can, indeed, be achieved, and a wise one can be achieved, only through our essential and traditional method of addressing ourselves to particular instances and to particular controversies in their real and human settings.

Only in a short run can this appear to be inconvenient to persons affected and their lawyers. Indeed, it means that they must look up cases, and look up "the law." But that is so of ordinary court law just as much as—perhaps more than—it is so of administrative law. The alternative, apparently some short cut to certainty, is illusory. It can lead only to abandonment of one of our most cherished legal traditions, to unreal and hard stratification, to law which lags far behind existing needs and so itself is brought into disrepute.

Occasional restatement of the substantive law of each agency as that law crystallizes and becomes identifiable is unquestionably desirable. S. 675 provides for that. A similar task has been achieved by the American Law Institute in its suggested Code of Criminal Procedure. My own experience leads me to the belief that more than this is both impossible from a practical standpoint and undesirable.

Sincerely yours,

WILLIAM DRAPER LEWIS, *Director.*

STATEMENT SUBMITTED ON BEHALF OF CONGRESS OF INDUSTRIAL ORGANIZATIONS BY LEE PRESSMAN, GENERAL COUNSEL, TO THE SUBCOMMITTEE OF THE SENATE JUDICIARY COMMITTEE RELATING TO S. 674, S. 675, AND S. 918

The Congress of Industrial Organizations has a definite interest in the subject matter of the three bills before this committee. Many of the Government agencies affected by these bills deal with social and labor legislation. Perhaps of first importance is the National Labor Relations Board, which is charged with the responsibility of securing the protection of collective bargaining guaranteed by the Wagner Act.

The list includes the Wage-Hour Division of the Department of Labor, which administers the provisions of the Fair Labor Standards Act of 1938 establishing a floor for wages and a ceiling on hours; the Children's Bureau of the Department of Labor which enforces the child-labor prohibitions of the same act; the Public Contracts Division of the Department of Labor, which administers the Walsh-Healey Act establishing wage-hour, child-labor, and safety standards for work performed on Government contracts; the Social Security Board of the Federal Security Agency, which administers the Federal system of old-age and survivors benefits, and supervises the grant-in-aid systems of old-age assistance, unemployment compensation, aid to dependent children, to the blind, and maternal and child-health care; the United States Maritime Commission, which admin-

isters policies vitally affecting the working conditions of seamen; and the Bituminous Coal Division which deals with the price structure of that industry, which in turn affects the wage structure.

In addition to these agencies handling specific labor matters, we are definitely interested in the operations of the other Federal agencies. The Congress of Industrial Organizations, representing a substantial body of citizens, is interested in the effective enforcement of the Securities and Exchange Act. The Federal Communications Commission has a major influence upon free access to radio facilities of vital importance to us. In short, and to state it simply, we are profoundly concerned with the fundamental principles of administrative procedure because these principles govern the operations of the administrative branch of the Government under which we live.

Before coming to a consideration of the bills, we would like to set forth a summary of the approach we take to the problems of administrative law. Let me say, first of all, that we want a governmental agency to be able to work. It has a function to perform, to carry out the purposes and policy of the statute under which it acts, and just as a plain matter of business, the agency has got to be able to do its job. If there is any objection to the statute, then the proper democratic way is to make substantive changes through the regular legislative process. I emphasize this point because much of the recent attack on administrative practices and measures like S. 918 are really attacks on the policy of progressive Federal laws. They are attempts to nullify these laws by making it difficult, if not impossible, for any agency to operate, to do its day-to-day business.

In stressing efficiency, we do not mean to make it the exclusive and paramount guide. On the contrary, we insist upon the fundamental procedural requirements of due process, namely, notice and public hearing with full opportunity to present testimony and to meet testimony. We agree with the illuminating recommendations set forth in the Report of the Attorney General's Committee on the necessity for full publicity on the structure and personnel, and on policies and rules to the extent they are promulgated in regulations and decisions. So far as possible, this information should be readily available throughout the country and should be set forth not only in the technical language of the expert, but in terms understandable by the rest of us. There is one statement in the report which should be posted in every governmental agency office. It is: "An important and far-reaching defect in the field of administrative law has been a simple lack of adequate public information concerning its substance and procedure."

We believe there should be a judicial review of adjudications to check whether an agency has observed the statutory limits of its power. But we also think that within these limits, the quality of administrative action must be guaranteed by standards ultimately enforced by political responsibility. The courts are not the cure-all. The real dangers of bureaucracy lie in the technical mumbo jumbo, the red tape, and officious secrecy. These are the barriers against public knowledge of an agency's performance record. A bureaucrat doing nothing or doing badly finds his best protection in a Chinese wall of mystery and public ignorance of his conduct. What we need are institutions for the public dissemination of factual information on what an agency is doing—specialized by regions and interests particularly affected. Our newspapers and radios should be telling us what the Federal Trade Commission is doing to protect consumers, what the Power Commission is doing to get us power, and what the defense agencies are doing to provide us with the articles of national defense. An understandable account of railroad and water-carrier rate regulations would keep us informed on vital issues of the day. The administrative agencies are the operating units of our Government. We must ultimately rest upon an informed and intelligent popular will for the efficiency of democratic government. The courts cannot defend us from ourselves.

There is another major factor in good administration, which must emerge as a matter of political ways of doing business rather than induced by any judicial strait jacket. I refer to the principle that an agency must endeavor to secure a maximum representation of affected interests. We have had special occasion to emphasize the necessity for adequate labor representation on governmental agencies administering social legislation. There is only one way for an agency to lay down a policy that meets the realities—it must get the experience and judgment of the individuals and groups confronting the practical problems. In the case of adjudications, there is a formal procedure for controversial determinations, but even in these cases, as the report indicates, informal procedures dispose

of most business. It is worth repeating, for example, that the Labor Board, despite the furious opposition to the act, nevertheless disposed of 90 percent of its cases through informal procedures.

S. 918

We refer to the foregoing considerations because they help to answer many questions raised by the three bills before this committee. We do not intend to waste much time on S. 918. It is a destructive measure. It does two things: It ties up administrative procedure in knots and then delivers the bound victim over to the courts for complete dissection. It would literally be impossible for any agency ever to make a decision except after interminable delays and if it ever made a decision, it would never be able to enforce it.

I mention a few of the most objectionable features of S. 918 that are not also contained in S. 674. Section 200 restricts representation in proceedings before agencies to lawyers. This would prevent labor-union organizers and officials from appearing in cases before the Labor Board, the Wage-Hour Division, and Social Security Board. The result would not be to improve the quality of representation, but only to increase expenses of workers. Title III of S. 918 carries the need for publicity of operations to the absurdity of mandatory hearings on every action taken by the agency interpreting and implementing its statute. Title IV on declaratory court review of rules transfers the administrative functions from the agencies to the courts—even before the agency gets to work. Section 708 (a) would impose the extraordinary requirement that hearing officials must be lawyers appointed by the United States district judge, agreeable to all parties.

The provisions of title VIII on Judicial Review are well designed to discredit the courts. It would burden the courts with the necessity of substituting their judgment on all facts and issues for that of the agencies. We think it would only be productive of great mischief and destroy the confidence of people in the fairness of legal proceedings. And again, we marvel at the ingenuous touch in section 801 of leaving court enforcement to the exclusive initiative of the party against whom an administrative order is issued. So, a corporation could simply refuse to do anything to comply with the Labor Board order, it could continue to violate the act with impunity, and nothing could be done by the Board or anybody else to compel obedience to the law.

S. 674

This minority bill is not as extreme as S. 918, but it would nevertheless effectively smother the administrative process. The numerous able witnesses appearing before this committee have pointed out how title II of the bill would require agencies to lay down their policies by advance codes instead of case-by-case adjudication. We shall not repeat the analysis. We support the view that these requirements are undesirable. Either general rules are laid down which are of little use to anyone, or else impossible detailed rules are required in advance of experience. . The effect of these provisions is obviously to limit the scope and application of statutes.

We think that is sound administrative practice for an agency to issue explanations of its policies and digests and commentaries on its decisions. But to confine the enforcement of statute within the limits of such practices is to nullify their effectiveness. Indeed, much of titles II and III suffer from the vital defect of making sound principles of intelligent discretion a set of mandatory rules subject to judicial sanction.

The declaratory-judgment procedure whereby these sanctions can be invoked would place the enforcement policy of a statute in the hands of corporations endowed with skilled counsel and ample funds to pick and choose the type and extent of litigation, exhausting the initiative and resources of the agency itself. It would reduce legislative programs to a legal duel between lawyers for private interests affected by the law and the Government lawyers. It would mean a lot of business for the courts, but no action to promote collective bargaining, establish minimum wages, or to pay out old-age insurance benefits.

We note the provisions of section 306 which would require an agency to reveal the identity of charging parties. This is a good way to prevent workers from filing claims for their rights and benefits under Federal laws.

We object to the provisions of title III, particularly sections 306 and 309 attempting to separate functions and to bar consultation between officials and agents of an agency. These provisions are nonsensical when, for example, they would prevent agency heads from consulting with their general counsel

or chief economist. They are a perversion of efficiency and due process when they prevent coordination and informed action among its agents.

This brings us to the provisions for trial examiners set forth in S. 675 and constituting the main features of S. 674. We are in favor of decentralizing the administrative process through the use of experienced and competent trial examiners. But there are two important qualifications. In the first place, a new law may require centralized enforcement until policies are developed, a set of rules hammered out, and a body of tested personnel established. Experience has confirmed this fact. To prevent such centralization and coordination from the beginning would be to impair the effectiveness of new laws that seek to establish needed changes and reforms.

In the second place, even after these conditions have been satisfied, an agency must retain control over its enforcement policies. The establishment of independent hearing officers, with fixed terms, and beyond control creates a source of conflict and divergence of policy. We are in favor of recruting skilled officials, paying them adequate salaries, and assuring them of security of tenure in their positions. But we think that the agency should have the power to remove a hearing officer, if in its judgment, he has not been carrying out its policies.

The provisions for judicial review set forth in section 311 of S. 674 are entirely unnecessary and productive only of delay and confusion. We are convinced that the scope of judicial review at the present time, under present legal doctrines, is a matter of self-limitation by the courts themselves. The courts have ample power to correct abuses, and to review findings of fact and law. The bill is really intended to overrule the recent decisions of the United States Supreme Court. That court has practiced the virtues of judicial self-limitation and given authority and power to the expert judgment of administrative agencies. Conservative judges have not relished the loss of their power. Conservative lawyers are bemoaning the loss of curbs upon progressive adjustments to changing conditions. S. 674 would be a serious backward step in administrative law.

S. 674

We have explained our position on this bill in dealing with our comments on the provisions of S. 674 for hearing officers. We think the bill is unnecessary. What was needed, and what the Attorney General's report has done, is to develop principles of administrative action to guide intelligent exercise of discretion and make their operations more subject to popular knowledge and political control. There is a further objection to the bill, and that is its omnibus character. Many of its provisions, even where generally sound, nevertheless thwart action in particular cases. Thus, the mandatory requirement of hearing officers in all cases in section 301 prevents the Labor Board from expediting simple representation cases by hearings before a staff attorney. Similarly the 45-day publication period required by section 203 would add unnecessary delay in determinations under wage-hour laws.

CONCLUSION

The Congress of Industrial Organizations, upon the uniform advice of labor lawyers and the experience of unions before administrative and judicial tribunals, is flatly opposed to S. 674 and S. 918. S. 675 should be revised in several respects. The entire subject is one of greatest importance. It calls for expert judgment. We are confident that no action will be taken except after fullest deliberation and study by this committee.

STATEMENT OF LOWELL WAKEFIELD, HERRING FISHERMAN, OF THE KODIAK DISTRICT OF ALASKA, REPRESENTING THE ALASKA HERRING PACKERS ASSOCIATION, THE UNITED FISHERMEN'S UNION AND THE FISH REDUCTION AND SALTERY WORKERS UNION

The fishing and processing of herring is Alaska's fourth largest industry. Twelve firms normally operate, with fishing and shore crews totalling 1,200 men. The investment in plants, boats, gear, and other equipment comes to some $6,000,000. The principal products are fish oil, fish meal, and Scotch cure salt herring.

The herring industry is vitally interested in the several bills on administrative procedure now being considered by your committee. Our working lives are circumscribed by Federal laws and regulations governing the days and hours during which we can fish, the size of our nets, the places where we can fish, the number, type, and size of fish we can catch and the manner in which these fish are handled after they are caught. The sea giveth and the Department of Interior taketh away.

We do not challenge the right or propriety of the Federal Government controlling the fishing industry in the interests of the public welfare. The fish which roam the high seas off the coast of the United States and Alaska are a valuable natural resource. It is important that such a resource be conserved and that restrictions which will guarantee a continuing supply are put into effect. It is equally as important, however, that this natural resource be utilized to the fullest extent consistent with sound conservation.

The interests of national defense make this latter point just now of special importance. The war has cut off all supplies of Norwegian cod and herring oil and Chinese tung oil, forcing the industries important to the defense effort, such as the leather tanning, animal stock feeding, and paint industries to turn to Alaska herring oil as the only domestic substitute. Because of this the President by a proclamation issued March 27, placed herring oil under the export control system.

Normal production of Alaska herring oil is not sufficient to meet present needs and it is therefore necessary to discover whether or not production in Alaska can be increased.

Yet the current 1941 fishing regulations issued last month by the Department of the Interior will close down half of the Alaska plants and cut production from five to about two and a half million gallons.

How does the Department of the Interior decide upon what regulations should be promulgated for any particular fishing season?

The Fish and Wildlife Service has a program of scientific inquiry. Unfortunately, however, this program of scientific inquiry is most limited as far as the herring fishing is concerned. To study a complex industry stretching over a couple of thousand miles of Alaska coastline, the Service now has a staff of one man operating on a budget of less than $1,500 a year. Their expenditures for scientific equipment for the year ending July 1, 1941, came to $36.62. It is obviously impossible to conduct anything approximating a scientific inquiry with so limited a personnel and budget. As a result, the formulation of regulations is pretty much by guess and by God.

The Fish and Wildlife Service does hold hearings at which representatives of the industry, the unions and, as a matter of fact, any interested party can submit argument and evidence concerning the coming year's regulations. Such a hearing was held last fall in Seattle. There were preliminary hearings during the fishing season at various Alaskan ports.

The industry heartily approves of hearings, but unfortunately these are completely one-sided. The Fish and Wildlife Service gives no indication as to what material it has, what arguments it has, what indications it has as to the regulations, or anything whatever concerning its plans. Those who appear at the hearings representing the fishermen or the employers are therefore under a great disadvantage, because they are in the position of a man on trial for a crime without knowing of what crime he is charged and without being able to hear the arguments or case of the prosecution.

When the herring people appeared at the hearing held by the Fish and Wildlife Service last fall, and I was one of those who spoke, they had a good deal to say along the line of suggestions for more practical regulations. But none of them had the faintest idea that there was anything to indicate a necessity for cutting down the total quotas of fish which we are allowed to catch. So that when fishing regulations were issued March 4, drastically cutting quotas in every fishing area, we were surprised, to say the very least, and felt that we had been dealt with improperly and unjustly, in not knowing ahead of time what the Service intended to do so that we had at least a fair chance to state our case and present our evidence on that particular point.

The attitude of the Fish and Wildlife Service on this subject is amply stated by its assistant director, Mr. Charles E Jackson, in a wire dated March 8, 1941, to Mr. Guy Alston, of Seattle. Mr. Jackson says: "Every effort humanly possible was made by our Service not to divulge any indication as to final form of regulations."

I hope I have made it sufficiently clear that it is precisely this sort of thing which does not give us a fair chance to have our say about regulations which not

only throw out of work half of the people in our industry but vitally affect the general welfare.

Our interest in such a measure, therefore, as Senate bill 674 is easy to understand. We heartily endorse the rule-making procedure set forth therein. We feel that there is a chance that the moral effect of the passage of such legislation might force the Department of the Interior to adopt a democratic method of promulgating fishing regulations. Our only criticism of such a measure is that it suggests and recommends the proper procedure, such as the issuance of preliminary or tentative rules and a delay in the effective date of regulations after their issuance, but does not make such procedure mandatory.

It is true, of course, that the industry has recourse to the courts against what it may regard as unjust and illegal methods of formulating fishing regulations, yet such recourse is expensive, takes a lot of time, and should be completely unnecessary when, in the last analysis, the interests of government and the interests of the industry should, on issues of this kind, be identical, since both are concerned in an efficient, long-range exploitation of natural resources and the establishment of a sound conservation program.

STATEMENT BY EMMETT F. CONNELY, PRESIDENT, INVESTMENT BANKERS ASSOCIATION OF AMERICA, TO THE JUDICIARY COMMITTEE OF THE SENATE ON S. 674, S. 675, AND S. 918, WHICH DEAL WITH ADMINISTRATIVE PROCESSES BY GOVERNMENT AGENCIES

The Investment Bankers Association of America, a voluntary not-for-profit association of 673 member firms with offices in all the financial centers and larger cities of the country, has long been deeply interested in the general type of legislation proposed by the pending administrative procedure bills. We are interested not alone from the standpoint of the investment banker or the dealer and trader in securities, whether on the stock exchange or in the over-the-counter market, but also from the standpoint of our clients, and particularly the industrial corporations whose securities we underwrite and distribute to the public and who represent practically every phase of business enterprise. We are not concerned specifically as to any particular agency of government, since we, in the regular course of business, have brought to our attention the administrative activities of most such agencies. We are interested, primarily, in the fundamental governmental policies involved. It is our purpose, therefore, to speak not with too much particularity as to technical legislative provisions, but as to fundamentals which we feel are generally applicable without regard to any specific agency.

We commend the very excellent and constructive work done by the Attorney General's Committee in its survey and report on the subject of administrative procedure. We feel that there is now no occasion for delay in formulating legislation substantially in conformity with that report, taking into consideration the majority and minority statements. This we respectfully urge Congress to do with all promptness consistent with appropriate hearings and careful draftsmanship.

The country has long been in need of legislation designed to reassert the American way of government by law with full right and opportunity for hearing by those directly concerned, a definite separation of prosecutory and judicial powers, and opportunity of review by the courts in all proper cases.

We are aware that administrative agencies with certain breadth of power and discretion are necessary to a large and complicated Government such as ours. We are aware, too, that it is necessary to delegate to these agencies certain rule-making powers with the effect of law, subject only to being within the provisions of the Constitution and the intent of the statutes which the agencies are called into existence to administer. We are familiar with the fact that the administrative agencies of Government are not of recent origin. They have, however, increased in number and importance in more recent years. The principles of administrative law as administered by the agencies have not always been parallel to the purposes and intent of the enactments of Congress which they administer; rights of the citizen are often disregarded; zeal for reform is supposed to justify short cuts. It is but natural for governmental agencies constantly to extend their power and authority, if permitted to go unguided and unchecked by superior authority, to the extent to which they, according to their individual concepts, think the law should or does direct. It has always been

thus with bureaucracies. Histories of government are replete with instances of this trend, some of which led governments to disaster and became stepping stones to totalitarianism.

We have reached the time and condition which makes it the duty of Congress to establish a policy by which these administrative activities, by whatsoever agency exercised, be maintained at an appropriate level, as nearly as possible without unduly handicapping the agency but more particularly saving to the people their full rights under our form of government and the opportunity of obtaining and exercising those rights with the least possible interference or question of doubt.

We shall not be surprised if the Congress finds it impractical, at this time, to formulate legislation ideally comprehensive and appropriate in every particular. There is now such a variety of agencies and of statutes administered by them—many of them of long standing with more or less established precedence and procedure—that they present a jigsaw puzzle which in all probability cannot be put together with a nicety of precision which would be desirable under more favorable conditions. This, however, only adds force to the viewpoint that Congress should take a decisive step now. If further improvement should prove to be needed, that can follow in due course.

If nothing more is done than the enactment, in statutory form, of a declaration of sound congressional policy as a fundamental guide to administrative agencies, a very great deal will have been accomplished. But few agencies will fail to observe such policies. The great majority will rather closely adhere to them. This will be more particularly true if it is supplemented with definite provisions as to administrative procedure in all cases where Congress finds that it can establish by law reasonable procedure as definite directions to the agencies.

As to the three bills now before your committee, we observe that S. 674 and S. 675, taken together, embody the thoughts and recommendations of the report of the Attorney General's Committee; that S. 674 most nearly conforms to the proposals by the minority of the Attorney General's Committee and S. 675 most nearly conforms to the proposals by the majority of that Committee. We feel that these two bills, taken together, furnish the basis for legislation which may be appropriate at this time. For these reasons we feel justified in discarding S. 918 in our present consideration and for the purposes of this statement.

We shall now give our thoughts with respect to some of the fundamentals as contained in these bills.

DECLARATION OF GENERAL POLICY

Each of these bills contains certain declarations of general policy (sec. 101 of both). Fundamentally, each of these declarations is sound but differ somewhat in tone. We suggest the feasibility of incorporating the substance or central thoughts in each of these as a declaration of general policy in whatever bill may be enacted into law. Likewise, we are inclined to the view that other declarations of policy embodied in either of the bills under separate titles might well all be incorporated in one broad general declaration of congressional policy. This would embody in one place all of the fundamental policies to be enunciated by the Congress as a sort of charter power or perpetual bylaw as a guide not alone to the agencies but to all who come within the jurisdiction of the administrative authority of such agencies. This, together with the establishment of the Office of Federal Administrative Procedure with appropriate power for receiving complaints and of investigation, should alone go far toward putting the administration of all regulatory types of statutes upon the proper foundation without embarrassment to any agency.

OFFICE OF FEDERAL ADMINISTRATIVE PROCEDURE

It is observed that by both S. 674 and S. 675 it is proposed to establish a permanent Office of Federal Administrative Procedure, with the duty, among other things, to hear complaints, to investigate agencies, and to recommend further legislative action. For this and other reasons we heartily endorse and urge the adoption of this provision. The Office may then be directed to make a special study of any phases of administrative procedure which may not now be clear. It should afford opportunity to all rightfully concerned to be heard in a thoughtful, deliberate way, and in due course make a report to Congress with its findings and recommendations.

RULES OF PROCEDURE—HEARINGS—PUBLICATION

We urge the requirement for hearings, in appropriate form, on all rules of procedure other than rules respecting the internal affairs of the agency itself and its personnel, and that publication be given to such rules for a reasonable period of time before they become effective. We are inclined to the opinion that 45 days, as suggested in section 203 of S. 675, is a longer period than is necessary, and that perhaps 30, or probably 20 days, is sufficient. We agree, however, that emergencies are sure to arise in the due course of administering most, if not all, these laws, which will demand prompt consideration and immediate solution where possible. We do not think it is necessary to outlaw these emergency situations or to hinder justice to the parties involved in them. We suggest that it be provided that all rules, other than those issued under an emergency situation, become effective only after a hearing and due publicity for a minimum number of days, but further suggest the feasibility of provisional rules to meet emergency situations, upon a finding of the agency that an emergency exists. Such provisional rules would affect only the particular emergency situations but might become permanent and of general operation upon publication and hearings.

INDEPENDENCE OF HEARING OFFICERS

The provision for appointment of hearing officers by the office is an important and necessary step in the right direction. It tends strongly toward independence of these presiding officers and the separation of prosecutory and judicial functions. It is observed, however, that by both S. 674 and S. 675, hearing officers, although appointed by the office, are to be nominated by the agency to which they are to be accredited. This, of course, does not assure the absolute independence so necessary to a complete separation of prosecutory and judicial functions of the administrative agency. So long as hearing officers are dependent upon the agency itself for their nomination to a panel from which their names may be selected for a desirable position with the agency, such hearing officers will, inevitably, be in the position of an "emotional affiliate" and cannot be entirely removed from the possibility of influence by the nominator. In a recent case under the Holding Company Act, the court construed the phrase "controlling influence" to mean "the act or process or power of producing an effect which may be without apparent force or direct authority and is effective in checking or directing action, or exercising restraint or preventing free action."[1]

With the power of nomination in the agency, some degree of "controlling influence" is most likely to occur. Also, by putting power of nomination in the agency and the power of appointment in the Office, divided responsibility is ever present—a condition normally not conducive to the best results.

We urge that the Office be given the sole appointive power with complete responsibility but with direction that in appointing hearing officers consideration be given, among other things, to knowledge and experience with the subject matter under the jurisdiction of the agency to which the officer is to be assigned. While we think this possible and practicable, if the Congress should feel that at this time it has not sufficient data and information on which to base a provision of that character, this should be placed in the category of those subjects which the Office is directed to study and report to Congress in due course.

EXEMPTIONS

We are pleased to note the comparatively small number of exemptions in these bills as compared to the Walter-Logan bills of last year. We cannot agree with the thought expressed by some that exemption should be provided for the older agencies which have already formulated substantial and acceptable rules of procedure and of administrative practices. Unless exemptions can be on the basis of fundamental standards of principle, then any exemption can be nothing more than an exception in favor of this or that agency accordingly as the estimate may be of it already having conformed to the fundamental

[1] *Detroit Edison Co. v. Securities and Exchange Commission* (U. S. Cir. Ct. of Appeals, 6th Circuit, May 12, 1941).

principles of this legislation. That such agency may have conformed to such practices in the past is no evidence that it will continue to do so in perpetuity. This is particularly true if, in the future, the heads of any such agency should conclude that by reason of the exemption it is above and beyond the purposes and policies of this legislation. Such is not sound for the agency itself, and it certainly is not fair to the other and perhaps younger agencies, which would thereby be singled out as bad examples. But, above all, it is not fair to the public. If this legislation does not have back of it fundamental principles of a substantial character in the public interest, regardless of what or who the agency may be, then it has no place on our statute books and ought not be enacted. With sufficient leeway for those agencies which already are in substantial conformity to the declared policies to make appropriate adjustments over a reasonable time and without violent eruptions, no harm can be done but great good would be accomplished.

There should be no open door for political pressure or special pleading in the interest of this or that agency on the basis of its already accomplished high qualities. It cannot complain if legislation is built around those qualities designed to preserving them for all time.

It is quite natural for all governmental agencies to look upon this proposed legislation as not needed except as to some other agencies. Most such agencies act or persuade themselves that they act on some general rule or principle which, according to their own concept, is appropriate to the task they have undertaken to perform. Naturally, if they were critical of their own procedure, they would change it, and the only way in which substantial compliance with the principles and policies laid down by Congress may be assured is to have the provisions of the act apply as nearly as possible to all alike, with sufficient elasticity or discretionary power to meet extraordinary situations, and particularly those which may arise during a period of adjustments.

DECLARATORY JUDGMENTS

De doubt the feasibility of making it mandatory upon the agencies to issue declaratory judgments with respect to rules or other similar matters under the law the agency administers. We urge, however, that a way be left open with definite encouragement to issue such declaratory judgments wherever and whenever it may be practicable to do so, but with a provision substantially as suggested in appendix A to the comments of the Securities and Exchange Commission on administrative procedure bills filed with this committee.

JUDICIAL REVIEW

We urge the adoption of the provision of S. 674 with respect to judicial review, as against the corresponding provision in S. 675. By section 311 of S. 674, comprehensive and workable provisions are made for judicial review. Under subsection (e) (scope of review), it is provided that the reviewing court "regardless of the form of the review proceeding, shall consider and decide, so far as necessary to its decision and where raised by the parties, all relevant questions of (1) constitutional right, power, privilege, or immunity; (2) the statutory authority or jurisdiction of the agency; (3) the lawfulness and adequacy of procedure; (4) findings, inferences, or conclusions of fact unsupported, upon the whole record, by substantial evidence; and (5) administrative action otherwise arbitrary or capricious: *Provided, however*, That upon such review due weight shall be accorded the experience, technical competence, specialized knowledge, and legislative policy of the agency involved, as well as the discretionary authority conferred upon it." We particularly urge the importance of clause (4), "findings, inferences, or conclusions of fact unsupported, upon the whole record, by substantial evidence." Some raise a question as to the use of the phrase "upon the whole record" and imply that this is without meaning. On the contrary, it is our opinion that these words have a very definite meaning and are of great importance. This phrase is not a stranger to court decisions, reports of masters, and other similar records, where cases are decided upon evidence. The point is that the record, as a whole, must be taken into consideration in determining whether there is "substantial" evidence to support the decision on review. It is used to distinguish between a consideration of the whole evidence and a consideration of a part of the evidence. A part of the evidence taken alone may be deemed substantial but when weighed as a part of the whole evidence may not

be substantial at all. Should agencies be prone to give superior weight to a part of the evidence which, when taken alone, substantially supports its preconceived opinion as to an appropriate conclusion, such may be corrected only by an independent court of review arriving at its conclusions "upon the whole record." This act should leave no doubt about the duty of the court in that respect.

As long as decisions and orders of agencies are to a degree within their discretion, based upon opinion, it is difficult, if not impossible, for a court of review to arrive at a proper conclusion, unless the court has the privilege and the duty of considering the case "upon the whole record." Otherwise there is no purpose and nothing to be gained by the court reviewing the testimony at all. Where there is no conflict as to the weight of testimony, there would be no dispute as to facts, and in that case there is nothing for the court of review to determine but the matter of constitutional or legal right.

It must not become impossible or even difficult for the courts to maintain the rights of individuals. The right of appeal to the courts is an essential element in any act of Congress on the subject of administrative law.

We are aware of the argument put forward in some places, to the effect that to render appeal to the courts too easy would serve only to flood the courts with endless litigation. At this point we take the privilege of quoting the Right Honorable Lord Hewart, Lord Chief Justice of England, in his book entitled "The New Despotism," published in 1929, at pages 154 to 158, inclusive:

"Those who favor or defend the accumulation of despotic power in the hands of anonymous officials sometimes suggest the question whether what is really desired by their opponents is that there should be an endless stream of litigation. The question, of course, lacks honesty. It implies, without having the courage to allege, that the aim of the despot in arrogating to himself despotic powers is to save the citizen the burden and the expense of lawsuits. A person who was willing to believe that would be willing to believe anything. No; what is desired is not that there should be endless litigation but rather that litigation should be rendered as a rule unnecessary by the diffused and conscious knowledge that, in case of need, recourse might be had to an impartial public tribunal, governed by precedent, and itself liable to review. Nobody outside Bedlam supposes that the reason why courts of law exist in a civilized community is that the founders of the State have believed happiness to consist in the greatest possible amount of litigation among the greatest possible number of citizens. The real triumph of courts of law is when the universal knowledge of their existence, and universal faith in their justice, reduce to a minimum the number of those who are willing so to behave as to expose themselves to their jurisdiction. It is not the individual case that matters. If a person turns any day from the Strand into the Royal Courts of Justice, he may find in one court a trial about a libel, in another a trial about a partnership, in a third a trial about the sale of goods, and in a fourth (with tolerable certainty) a trial about a collision between two stationary motor-cars. If he thinks of the individual case and the individual case alone, he may hastily conclude that a sad waste of time and of money is going on. But upon further reflection it may occur to him that what is really of value, and of inestimable value, is the public and permanent spectacle which shows that if contracts are broken damages must be paid, if torts are committed unpleasant consequences follow, and if crimes are perpetrated punishment must be suffered; with the total result that, in general, contracts are not broken, torts are not committed, and crimes are not perpetrated. It is really a vast system of public insurance. The knowledge that the machinery exists, and that when it is employed it is employed with skill and without favor, has the effect of rendering its employment unnecessary save only in the exceptional case.

"To apply reflections of this kind to the present matter, it is obvious that the critics of departmental despotism desire, not litigation, but that fairness of decision which, while it renders litigation in general unnecessary, is enormously encouraged and fostered by the prevailing knowledge that, in case of need, there is a law court in the background. It is not in the smallest degree desired that the departmental decisions, when they are given, should be of such a kind as to call for review and correction by a court of law. In the contrary, what is desired is the exact opposite. But the best way of securing that result is to provide that the decision which is taken may, if the party aggrieved be so minded, be brought before the courts in the ordinary way. Or rather, to be more accurate, it is necessary that there should not be a statutory provision which deprives the aggrieved party of that remedy. The same conclusion is reached if the matter is considered from the point of view not of the citizen but

of the department. One has to contemplate a case where some comprehensive scheme or program is being carried out, under which the rights of particular individuals are, or may be seriously affected. The statute provides that, if questions of a certain kind arise, the decision is to rest with the Minister—that is, with some official in a particular department. What is likely to be the effect, in the long run, upon the mind of that official if he knows beforehand that any decision which he may give, however unreasonable it may be, and however little capable of being coordinated with other decisions given in a similar way, cannot in any circumstances be questioned before a court? Nobody imagines that he approaches the task with the conscious intention of doing injustice. But it is tolerably obvious that in such a case different considerations may apply from those which would naturally lead up to an extremely careful and well-considered system where every decision was made with the knowledge that at any moment both it and the rest might have to be explained and defended in public before an impartial investigator. Nor should at least two other considerations be overlooked. The first is that, as things stand, the official charged with the final and unimpeachable right of giving the decision is to all intents and purposes the other party to the controversy. The scheme is really ludicrous. One of the parties is absent; there is no hearing; the decision is given by the opposite party; and there is no appeal. It is certainly a simple and expeditious way of disposing of controversial questions. But it is hardly likely to bring into existence a body of case-law that would stand examination. The other consideration—and it is fundamental—is that this invidious task, this almost impossible duty of doubling the parts of suitor and judge in the absence of the other party, is not something which is thrust from outside upon a body of reluctant officials. No, it is they who seek it, it is they who ask for it, and it is they who contrive it. It is not that some other authority shirks and evades the duty. All others are deliberately excluded, and it is a cardinal feature of the departmental scheme, departmentally conceived and departmentally brought to birth, that the department itself should possess these despotic powers. That is a sinister fact which should never be forgotten."

FURTHER STUDIES

In view of the many agencies now in existence by virtue of the divergent acts of Congress, we realise the impracticability of legislating at this time an absolute uniformity of procedure for all agencies and the finding of a completely satisfactory solution to some of the problems. We are agreeable to the thought that no agency should by the enactment of these bills be thrown into chaos or have its rules or procedure shuffled into unworkable or impracticable forms. We urge, however, as complete an approach as possible to the fundamental necessities for this legislation with sufficient leeway for a gradual approach to substantial uniformity in the matter of procedure and the fundamentals of agency administration as laid down by the declaration of policies set forth in these bills. To meet these situations and to bring about a continuing approach to the fundamental objectives, we suggest the advisability of provisions in the bill directing the office to make a study of those problems in which that course seems appropriate, with full opportunity for all who may evidence interest to be heard and to make suggestions if they are in a position to give constructive suggestions in support thereof.

Respectfully submitted.

LAWYERS AND NONLAWYERS AS PRACTITIONERS BEFORE THE INTERSTATE COMMERCE COMMISSION

By BALTHASAR H. METER[1]

Hundreds of practitioners appeared before the Interstate Commerce Commission between January 1, 1911, and April 30, 1939, the period of my service. From the standpoint of performance, I am unable to classify them as lawyer or nonlawyer. They differed just as individuals in any group of men of similar size will differ.

[1] Formerly a member of the Interstate Commerce Commission.

The practitioners could readily be grouped into broad classes, basing the distinctions upon different qualities of mind and training, including their respective formal schooling in what is called law, and formal admission into a society called a bar, but also including all other kinds of training and experience. Although law has long been recognized as one of the great professions, membership in a bar association or graduation from a law school and admission to a bar are by no means the decisive requisites for the successful conduct of proceedings before agencies like the Interstate Commerce Commission. Training in other lines of study may be just as helpful, or even more so. This appears on the face of the thousands of decisions which the Interstate Commerce Commission has rendered. Cases before the Commission involving fine technical distinctions in law are few and often go to court. The practitioner before the Commission may have little to do with the purely technical legal elements of such a proceeding. Men who understand transportation, and particularly men who thoroughly understand the facts in the case they are presenting are the most helpful to the Commission. The degree of their helpfulness is not determined by the amount of formal professional legal education they may possess. These have their value but other qualifications may have equal or greater value.

During the thousands of arguments to which I listened, it almost never occurred to me to ask in my own mind whether the speaker was a lawyer or a nonlawyer. That made no difference to me. His ability, honesty, industry, thoroughness, and clarity in presentation made much difference. The decisions of the Commission would have been the same whether the practitioners had all belonged to one class or the other.

I understand that the leading motive in the proposed legislation is to insure full and fair hearings and just and lawful decisions on the records as made on the part of each administrative agency. That is a worthy purpose, but it has absolutely nothing to do with the question whether a practitioner is a lawyer or a nonlawyer. The qualities of the decisions of an administrative agency are not determined by the practitioners.

Fair hearings and just decisions depend primarily upon the honesty, integrity, ability, industry, and nonpartisanship of the commissioners or members of agencies who make the decisions. Fair hearings and just decisions cannot be assured when an agency is a part of political branches of the Government, or subject to their direction or influences. Only proper personal qualifications on the part of the men who make the decisions and their absolute divorcement from all external influences will assure just and lawful results. Practitioners, whether lawyers or nonlawyers, cannot and do not determine those results.

The men who now compose the list admitted to practice before the Interstate Commerce Commission meet present requirements. If practitioners before other agencies do not, they should be brought up to that same level, not only with respect to practitioners, but also with respect to full and fair hearings and honest and fair decisions on the record and only on the record. This proposed legislation cannot improve the work of the Interstate Commerce Commission and of those other agencies that conduct their work in the same manner. Those agencies that do not reach that level of performance should alone be made the object of legislation, aiming to improve the quality of their service. Excluding from practice all nonlawyers will not have that effect.

LETTER FROM THE AMERICAN NATIONAL LIVE STOCK ASSOCIATION

DENVER, COLO., *March 7, 1941.*

Hon. CARL HATCH,
United States Senate, Washington, D. C.

DEAR SENATOR HATCH: I understand that hearings will be held before your subcommittee beginning on March 31 on Senate bills 674 and 675 and possibly 918, all of which seek to prohibit nonlawyers from practicing before the Interstate Commerce Commission and other administrative agencies.

For 12 years past, our association has been served by Mr. Charles E. Blaine and his son Calvin Blaine as traffic counsel and assistant traffic counsel, respectively.

In my opinion, and in the opinion of practically all who have seen Mr. Charles E. Blaine work in traffic hearings, he is equaled by few men throughout

the entire country, whether they are lawyers or nonlawyers. He has a first-hand knowledge of railroad matters, having served in various capacities, from brakeman up, for many years before starting in his present work as traffic counsel. He has a knowledge of all traffic cases pertaining to the western livestock industry which I do not believe is equaled by any other person in that work on either side of the council table.

I say unhesitatingly that it would be a great injustice to the industry if these bills were to pass and to prohibit the practice before the Commission of men like Mr. Blaine who, by long experience in their chosen field, are better qualified to serve than any lawyer could possibly be without that long experience. It so happens that the traffic field is a very peculiar one, and the men who really devote themselves to it have no time for any outside activity. No matter how capable a lawyer the railroads send into some of these cases, though among the most brilliant on their staff they cannot hold their own with traffic representatives who have come up through the hard school which has developed men like Mr. Blaine, his son, and many others, and this has been demonstrated time and again at hearings of great importance to our industry.

It is barely possible that I will be back in Washington in time to testify before your committee. I should appreciate it if you would advise me by early mail how long the hearings will continue, but in the event that I do not get to make a personal appearance, will you please place this letter before your committee as our earnest protest against enactment of these bills.

Yours very truly,

F. E. MOLLIN, *Secretary.*

TELEGRAM FROM LESLIE LACROSIZ, TRAFFIC MANAGER, EVANSVILLE, IND., CHAMBER OF COMMERCE

EVANSVILLE, IND., *June 2, 1941.*

DIX W. PRICE,

Clerk, Senate Judiciary Committee, United States Senate:

Your wire. Regret unable testify before Subcommittee on Administrative Procedure this Friday. Position, Evansville Chamber Commerce in opposition to these bills, particularly as they relate to Interstate Commerce Commission practice, on file with Senators Van Nuys and Hatch. My personal views are nonlawyer practitioners who, by education, training, and experience possess necessary qualifications and can be of assistance to Commission in reaching its finding and conclusions should be permitted to practice and the Interstate Commerce Commission should in the future, as in the past, determine the fitness of those practicing before it.

Respectfully ask you transmit this telegram to Senator Hatch.

LESLIE LACROSIZ,
Traffic Manager, Evansville, Ind., Chamber of Commerce.

STATEMENT OF THE HOOKER ELECTROCHEMICAL CO.

NIAGARA FALLS, N. Y., *May 16, 1941.*

Pending legislation relative to administrative procedure in Government agencies, as exemplified in S. 674, S. 675, and S. 918.

JUDICIARY COMMITTEE,
United States Senate, Washington, D. C.

GENTLEMEN: This company, in common with many other chemical and other industrial organizations of Niagara Falls and throughout the country, is keenly interested in any legislation affecting the Patent Office. It is believed that the leadership of this country in the mechanical and electrical arts, as well as its rapid strides of the last 20 years in the chemical arts, would not have been possible without our patent system. Without this system there would be little incentive to spend money in research, the benefits of which would be immediately appropriated by all the world without repayment of the cost. Such research could therefore be undertaken only under conditions of extreme secrecy, and generations might elapse before the benefits would be freely shared. Under our patent system, on the contrary, the results of research are published through

the issue of patents, copies of which can be obtained by anyone for a nominal charge. It is true that the public does not immediately share the invention on equal terms with the inventor, but the public does generally profit immediately, directly or indirectly, from the invention, and within the quite reasonable period of 17 years the invention is shared in full by all.

Our patent system is the most liberal of all the patent systems that have been set up by the countries that encourage invention, and to that is undoubtedly attributable the fact that we are and have always been in the vanguard of progress. It is true that there have been abuses of our patent system, but these have been largely corrected and are being remedied from time to time by regulations wisely promulgated by the Patent Office itself. Any proposal to change the patent system should therefore be examined with the utmost care.

It has been the writer's privilege for more than 40 years to have dealings with the Patent Office, as inventor employing others as agents, as inventor prosecuting his own applications for patents, as agent for other inventors, and as patent adviser to a large chemical company that is engaged in one of the most competitive and rapidly expanding fields of industry. During all these years the writer has been arguing obscure points of mechanical, electrical, and chemical technology with Patent Office examiners, sometimes prevailing and sometimes not. Never once in all this time has he felt that the ultimate outcome was otherwise than in full accord with a fair, just, and intelligent interpretation of the facts. The writer takes pleasure in saying, what the Patent Office could hardly say for itself, that in his opinion the Patent Office, as at present organized and staffed, is one of the most efficient organizations, as well as one of the most impartial tribunals, of this or any other country. The entire staff down to the youngest examiner seems imbued with a keen sense of responsibility for continuation of the orderly progress which is dependent upon science and invention, under the aegis of the patent system. The facilities of the Patent Office are admirably organized for the convenience of the public. The rules of practice, while they perhaps are and always will be susceptible of improvement, are nevertheless the highly perfected result of years of experience. They are fair and just to the public, as well as to the inventor and his attorney, and at the same time well calculated to avoid needless complication and expense.

It is noted that certain provisions of the proposed legislation, particularly as exemplified by bills S. 674 and S. 918, would seem to bar all persons other than lawyers from practice as agents or attorneys for inventors, in the prosecution of their applications for letters patent. This would constitute a radical change in the operation of the patent system and one that would disrupt the patent departments of many of our large industrial organizations. In these times of high specialization in almost every field, it has become the custom in large industrial organizations to take men from their technical staffs, who have become familiar with their research problems and acquired through experience a working knowledge of the patent law and the rules of practice, and procure their registration as patent attorneys, qualified to act for the other members of the organization, in the prosecution of patent applications. These patent attorneys do not become members of the bar and could not well do so without some sacrifice of the training that fits them so well for their vocations. They do not in any sense take the place of attorneys who first study law and then acquire technical knowledge. On the contrary, these two groups of attorneys supplement each other and both are as necessary for fullest utilization of the patent system.

In other words, several types of qualifications are desirable for the utilization of the patent system, namely those exhibited by the analytical or legal type of mind and those exhibited by the scientific, creative, or imaginative type of mind; and these qualifications are rarely combined in the highest degree in one person.

In some of the subdivisions of the classes having to do with chemical patents, the activity is so great that it is difficult for one person merely to keep track of the new patents as they issue. In one such subdivision there are nearly 200 patents, none of them expired. Some of these patents have to do with organic chemicals so complex that no nomenclature exists for their description and it is necessary to illustrate them by diagrams of the molecules, which find their way even into the claims. Obviously a very special type of training is required in order to prosecute applications in such fields.

In an instance known to the writer, a patent application was prosecuted by a patent attorney, not a lawyer, but who had started with a technical training and made many inventions in his own name. In preparing the application, the patent

attorney in this case pursued a line of inquiry that led to the broadening of the application and eventual inclusion of matter which later made possible an entirely new development in the automotive industry. It is believed that such instances are fairly numerous and that they are most likely to occur when the patent attorney has had a technical training and been an inventor himself.

It is therefore respectfully requested that in the proposed legislation no provisions be incorporated that do not have the approval of the Patent Office, or that would disbar patent attorneys who are not lawyers, and in particular who have a record of useful service to clients in the prosecution of patent applications.

We shall esteem it a favor if your honorable committee can find it possible to incorporate this letter in the record of your deliberations.

Very respectfully,

KENNETH E. STUART.

STATEMENT OF GEORGE C. SHOEMAKER, REGISTERED PATENT ATTORNEY

WASHINGTON, D. C., *May 1, 1941.*

Hon. CARL A. HATCH,
Chairman, Senate Judiciary Committee,
Senate Office Building, Washington, D. C.

SIR: The Walter bill, S. 918, is a bill which goes, generally, in the direction of improvements in practice before Federal agencies. Improvements to prevent abuses in practice are always desirable. However, in title II, section 200, the bill goes beyond "abuses" as to practices and does injury to innocent persons, in that it contains a requirement that is unfair and unjust to licensed patent attorneys who are not members of the bar, and does injury to the extent, perhaps, of abusing individuals now employed by these licensed patent attorneys because of their loss of positions, if the measure is enacted in its present form.

It was the year 1897 that the Patent Office began enrollment of registered patent attorneys. It was in the year 1898 that I became registered and was given license to practice as a patent attorney. I have been successfully engaged in practice before the Patent Office continuously since 1898. I am today enjoying a large practice and employ eight assistants, including stenographers. I had had six continuous years of training with a firm of patent attorneys from 1892 to 1898. This gives me 49 continuous years' experience—nearly half a century.

When one designates himself as a registered patent attorney, he most certainly does not designate himself as an attorney at law. He clearly distinguishes himself from the general practitioner. A registered patent attorney is the type of an attorney an inventor needs and wants because of his qualifications rather than an attorney at law unfamiliar with Patent Office practice.

Many registered patent lawyers of high standing in court practices may be unfamiliar with the technics and mechanics involved in patent matters and practice before the Patent Office, and for this part of their business they have to rely for guidance, advice, and other assistance upon patent attorneys. In a nutshell, general practioners, patent lawyers, and inventors seek and need the services of experts or those familiar with this specialized branch—patent soliciting—because of their intimate contact with the intricacies of Patent Office practice. Patent attorneys of long experience appreciate and fully recognize the attitude of the courts as regards the records made up in the prosecution of patent applications.

An inventor is obviously less liable to err in the selection of his attorney to prepare and prosecute a patent application for him, if he selects the properly designated registered patent attorney than if he elects a general practitioner or a patent lawyer familiar with court practice but unfamiliar with Patent Office practice.

I am a patent attorney of over 43 continuous years' standing. The passage of this bill as it stands would put me out of my life's work and cause me, after 43 years of continuous practice as a licensed patent attorney, to seek other means of support, and this, at my age, is almost intolerable to contemplate, when today men 40 and 45 years of age have difficulty in getting positions in most lines of industry.

I have assets which have accrued from my practice including goodwill, office equipment, outside investments, and lease for offices. I have assumed obligations

to clients, which have been made in good faith, on the strength of my license to practice as a patent attorney. Under the provisions of this bill, it appears that I would not be reimbursed for established goodwill but would be shut off as to goodwill, established after many years of honorable effort.

I most certainly have a legal and moral right to rely upon no retroactive action to disbar me from practice,

It is impossible for me to believe that the Congress of the United States will adopt the proposed legislation as it applies to nonlawyer patent attorneys but I feel, in justice to my standing in the profession, and my standing before the Patent Office and in my community, and in view of my many obligations to clients whose business I have accepted because of my license to practice before the Patent Office, as well as other obligations which I had a legal and moral right to assume, because of my license to practice, that I must, in all fairness to myself, my employees, and my clients, oppose this contemplated legislation insofar as it would in effect disbar me from practice. I have done nothing to warrant disbarment. To disqualify me now under the proposed legislation is certainly the equivalent of disbarment, if I no longer be permitted to practice and no longer permitted to utilize the knowledge and experience which I have gained in patent matters down through the years.

I cannot conceive wherein it can be fairly said that to now bar me, and many others like me, from practice before the Patent Office after so many years of continuous practice, would be reasonable, fair, or just. I believe that the Congress of the United States will sense the true situation and that the Congress will not sanction retroactive legislation to bar me and others after having given a lifetime of services as patent attorneys and prevent us from using the knowledge and experience and ability which we have derived as the result of our life's work.

I respectfully submit that in a spirit of fairness and justice, registered patent attorneys should be exempted under this bill, so that they may be permitted, under their legalized license and continued supervision of the Patent Office, to continue as patent attorneys and under their long established titles to exercise their abilities gained after many years of experience as patent attorneys. Supervision of patent attorneys by the Patent Office is sound policy and as sound and reliable as any supposed supervision of lawyer patent attorneys over nonlawyer patent attorneys, who may be unfamiliar with the technicalities and intricacies of Patent Office practice, however competent they may be in the courts.

Respectfully submitted.

GEORGE C. SHOEMAKER.

STATEMENT IN OPPOSITION TO ENACTMENT OF LEGISLATION WHICH WOULD PROHIBIT LAYMEN FROM PRACTICING TRANSPORTATION BEFORE GOVERNMENTAL REGULATORY BODIES IN MATTERS LEGISLATIVE IN CHARACTER BY THE SHIPPERS' CONFERENCE OF GREATER NEW YORK

MARCH 29, 1941.

Mr. DIX W. PRICE,
Committee Clerk, Senate Committee on the Judiciary,
United States, Senate, Washington, D. C.

DEAR MR. PRICE: The Shippers' Conference of Greater New York is an organization composed of traffic managers and other officers in charge of traffic of industrial concerns, commercial organizations and representatives of shippers interested in transportation. Its membership comprises the representatives of about 140 such concerns or organizations. The object of the Shippers' Conference of Greater New York is to promote the general interests of its members by taking united action in transportation problems.

As such an organization we have a substantial interest in S. 674, S. 675, and S. 018, which bills are pending in the Senate Committee on the Judiciary and it is our understanding that public hearings thereon are to commence April 2. Concerning S. 674, this conference neither favors nor opposes its enactment.

The provisions of S. 675 would place in the hands of the proposed Director of Federal Administrative Procedure discretionary powers to determine who shall and who shall not be permitted to practice before the various Federal

administrative agencies. This conference is squarely opposed to any legislation that might put in jeopardy the right of nonlawyers to appear and practice before the Interstate Commerce Commission or the United States Maritime Commission in instances where those bodies are performing functions legislative in character. Accordingly, the Shippers' Conference of Greater New York is opposed to those provisions of S. 675 which in any manner affect or may affect the right of laymen to appear and practice before the two above mentioned Governmental agencies and urges that this bill be amended by the insertion of a provision to the effect that nothing contained therein shall be construed to in any way deprive laymen or nonlawyers of their present right to practice before either the Interstate Commerce Commission or the United States Maritime Commission.

S. 918 would have the effect of specifically prohibiting laymen or nonlawyers from practicing before the Interstate Commerce Commission or the United States Maritime Commission. For the reason explained above in connection with S. 675, this conference is opposed to those provisions of that bill.

In support of our opposition there is being enclosed for your ready reference and convenience a statement in opposition to the enactment of any legislation which would prohibit laymen from practicing transportation before Governmental regulatory bodies in matters legislative in character. We respectfully urge that you give the enclosed statement your earnest consideration and enlist your support in opposition to the passage of the above discussed features to the bills, substituting therefor amendments that would remove our objections as explained above. Inasmuch as the inclosed statement is fully supported by competent court decisions, we ask that it be given the weight to which it clearly is entitled.

We respectfully request that this letter and enclosure be made a part of the record of the hearings on these bills.

Very truly yours,

GEORGE E. MACE,
Chairman, special committee.

STATEMENT

The Shippers' Conference of Greater New York, having recently voted at a regular meeting of its members to reaffirm its opposition to the above specified type of legislation, presents this statement in support of its contention that the practice by laymen before governmental regulatory bodies in matters legislative in character does not constitute the practice of law and should not, in the interest of the public, be prohibited.

ADMINISTRATIVE AGENCIES ARE NECESSARY BECAUSE OF THE COMPLEXITIES OF OUR MODERN LIFE

Chief Justice Charles Evans Hughes in an address before the American Law Institute at Washington, D. C., on May 12, 1938, said:

"The complexities of our modern life have brought into play rules of conduct which demand for their enforcement new machinery, and it results that a host of controversies as to public and private right are not being decided in courts. The multiplication of administrative agencies is the outstanding characteristic of our time.

"As I said some years ago, the demand for such agencies arises from a deepening conviction of the impotency of Legislatures with respect to some of the most important departments of law making. Complaints must be heard, expert investigation conducted, complex situations deliberately and impartially analyzed, and legislative rules intelligently adapted to a myriad of instances falling within a general class. Administrative agencies 'informed by experience' and which have shown their capacity for dealing expertly with intricate problems, as, for instance, in the case of the Interstate Commerce Commission, have won a very high degree of public respect."

THE INTERSTATE COMMERCE COMMISSION AND THE UNITED STATES MARITIME COMMISSION ARE THE AGENTS OF THE SENATE AND HOUSE OF REPRESENTATIVES CONSTITUTING THE LEGISLATURE OF THE UNITED STATES, BEING CREATED BY IT TO ASSIST IT IN ITS LEGISLATIVE PROCESS IN GOVERNING VARIOUS TRANSACTIONS SUBJECT TO ITS AUTHORITY THE LEGISLATURE THUS BEING ABLE TO APPLY ITS STANDARDS TO A HOST OF INSTANCES WHICH IT IS IMPRACTICABLE TO CONSIDER AND LEGISLATE UPON DIRECTLY AND THE ACTION BEING NONE THE LESS LEGISLATIVE IN CHARACTER BECAUSE TAKEN THROUGH A SUBORDINATE BODY. AND WHEN THE INTERSTATE COMMERCE COMMISSION OR THE UNITED STATES MARITIME COMMISSION FIXES, UNDER AUTHORITY GRANTED THEM BY THE LEGISLATURE, RATES, RULES, REGULATIONS, OR CLASSIFICATIONS TO GOVERN FOR THE FUTURE, THE POWER THEY EXERCISE IS LEGISLATIVE IN CHARACTER.

In *Crowell, Deputy Commissioner* v. *Benson* (decided Feb. 23, 1932, 285 U. S., 22), the Supreme Court said at page 58:

"Similar considerations apply to decisions with respect to determinations of fact by boards and commissions created by Congress to assist it in its legislative process in governing various transactions subject to its authority, as for example, the rates and practices of interstate carriers, the legislature thus being able to apply its standards to a host of instances which it is impracticable to consider and legislate upon directly and the action being none the less legislative in character because taken through a subordinate body." (See *Arizona Grocery Co.* v. *Atchison, Topeka & Santa Fe Railway Co.* (284 U. S. 370)).

In *Arizona Grocery Co.* v. *Atchison, Topeka & Santa Fe Railway Co.* (284 U. S., 370) (decided January 4, 1932), the United States Supreme Court said (at pp. 385, 386):

"Under the act of 1887 the Commission was without power either to prescribe a given rate thereafter to be charged (*Interstate Commerce Comm.* v. *Cincinnati, New Orleans & Texas Pacific Ry. Co.* (167 U. S. 479)), or *to set a maximum rate for the future* (*Cincinnati, New Orleans & Texas Pacific Ry Co.* v. *Interstate Commerce Comm., supra*, p. 196), for the reason that so to do would be to exercise *a legislative function* not delegated to that body by the statute.

"The Hepburn Act and the Transportation Act evinced an enlarged and different policy on the part of Congress. The first granted the Commission power to fix the maximum reasonable rate; the second extended its authority to the prescription of a named rate, or the maximum or minimum reasonable rate, or the maximum or the minimum limits within which the carriers' published rate must come. *When under this mandate the Commission declared a specific rate to be the reasonable and lawful rate for the future, it speaks as the legislature, and its pronouncement has the force of a statute. This court has repeatedly so held with respect to the fixing of specific rates by State commissions, and in this respect there is no difference between authority delegated by State legislation and that conferred by congressional action.*" (Italics ours.)

In the matter of the claim of *Paul Helfrick, respondent*, v. *Dahlstrom Metallic Door Company et al., supra*, the Court of Appeals of New York, at page 206, said:

"The State legislature cannot arbitrarily fix rates so low that a public-utility corporation will not receive a fair return on its capital. Although hearings may be had before a legislative commission, yet they are so lacking in the elements of a judicial proceeding that the rate, when ultimately fixed, is nevertheless considered the fiat or act of the legislature. The act or determination does not change its nature when passed on to another body created by the legislature, and termed a public-service commission or utility board. It performs the same work in fixing rates as does the legislature. The rate prescribed or permitted to be charged and collected must be subject to review by the courts when claimed to be an illegal taking of property. This distinction has been reiterated in *Bluefield Water Works & Improvement Co.* v. *Public Service Commission* (262 U. S. 679, 683), where it stated:

"'The prescribing of rates is a legislative act. The commission is an instrumentality of the State, exercising delegated powers. Its order is of the same force as would be a like enactment by the legislature.'"

(See also *Lehigh Valley Railroad Co.* v. *Board of Public Utility Commissioners* (278 U. S., 24)).

In *Ohio Valley Water Co.* v. *Ben Avon Borough et al.* (decided June 1, 1920) (253 U. S., 287), involving the fixing of a maximum rate for the future, under the public service commission law of Pennsylvania, the Supreme Court, at page 289, said:

"The order here involved prescribed a complete schedule of maximum future rates and was legislative in character. *Prentis* v. *Atlantic Coast Line Co.* (211 U. S. 210); *Lake Erie & Western R. R. Co.* v. *Public Utilities Commission* (249 U. S., 424)."

In Prentis et al., constituting the *State Corporation Commission of Virginia* v. *Atlantic Coast Line Co.* (decided Nov. 30, 1908, 211 U. S., 210), Mr. Justice Holmes delivered the opinion of the Court (p. 223):

"These are bills in equity brought in the circuit court to enjoin the members and clerk of the Virginia State Corporation Commission from publishing or taking any other steps to enforce a certain order fixing passenger rates."

At pp. 225 to 227 the Court further said:

"When a rate has been fixed, the commission has power to enforce compliance with its orders by adjudging and enforcing by its own appropriate process, against the offending company the fines and penalties established by law. But a hearing is required and the validity and reasonableness of the order may be attacked again in this proceeding, and all defenses seem to be open to the party charged with a breach.

"On July 31, 1906, under the provisions outlined, the commission published in a newspaper notice to the several steam railroad companies, doing business in Virginia, and all persons interested, that at a certain time and place it would hear objections to an order prescribing a maximum rate of 2 cents a mile for the transportation of passengers, with details not needed to be stated.

"A hearing was had and the complainants (appellees) severally appeared and urged objections similar to those set up in the bills. On April 27, 1907, the Commission passed an order prescribed the rates, but in more specific form. For certain railroads named, including all of the complainants except as we shall state, the rate was to be 2 cents; for certain excepted branches of the Southern Railway Co., 2½; for others, including the Chesapeake Western Ry., 3; and for others, 3½ cents a mile, with a minimum charge of 10 cents. Publication of the order was directed and at that stage these bills were brought.

"In order to decide the cases it is not necessary to discuss all the questions that were raised or touched upon in argument, and some we shall lay on one side. We shall assume that when, as here, a State constitution sees fit to unite legislative and judicial powers in a single hand, there is nothing to hinder so far as the Constitution of the United States is concerned. *Dolyer* v. *Illinois* (187 U. S. 71, 83, 84); *Winchester & Strasburg R. R. Co.* v. *Commonwealth* (106 Va. 264, 268). We shall assume, as we have said, that some of the powers of the Commission are judicial, and we shall assume, without deciding, that, if it was proceeding against the appellees to enforce this order and to punish them for a breach, it then would be sitting as a court and would be protected from interference on the part of courts of the United States.

"But we think it equally plain that the proceedings drawn in question here are *legislative* in their nature, and nonetheless so that they have taken place with a body which at another moment, or in its principal or dominant aspect, is a court such as is meant by section 720. A judicial inquiry investigates, declares, and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. That is its purpose and end. Legislation, on the other hand, looks to the future and changes existing conditions by making a new rule to be applied thereafter to all or some part of those subject to its power. The establishment of a rate is the making of a rule for the future, and, therefore, is an act legislative, not judicial in kind, as seems to be fully recognized by the supreme court of appeals. *Commonwealth* v. *Atlantic Coast Line Railway Co.* (106 Va. 61, 64), and especially by its learned president in his pointed remarks in *Winchester and Strasburg R. R. Co. and Others* v. *Commonwealth* (106 Va. 264, 281). See further *Interstate Commerce Commission* v. *Cincinnati, New Orleans & Texas Pacific Ry. Co.* (167 U. S. 479, 499, 500, 505); *San Diego Land & Town Co.* v. *Jasper* (189 U. S. 439, 440).

"Proceedings *legislative* in nature are not proceedings in a court within the meaning of Revised Statutes, section 720, no matter what may be the general or dominant character of the body in which they may take place (*Southern Ry. Co.* v. *Greensboro Ice & Coal Co.*, 134 Fed. Rep. 82, 94, affirmed sub nom. *McNeill* v. *Southern Ry. Co.*, 202 U. S. 543). That question depends not upon the character of the body but upon the character of the proceedings (*Ex parte Virginia*, 100 U. S. 339, 348). They are not a suit in which a writ of error would lie under Revised Statutes, section 709, and act of February 18, 1875 (ch. 80, 18 Stat. 318).

(See *Upshur County* v. *Rich*, 135 U. S. 467; *Wallace* v. *Adams*, 204 U. S. 415, 423). The decision upon them cannot be res judicata when a suit is brought. (See *Reagan* v. *Farmers Loan & Trust Co.*, 154 U. S. 362.) And it does not matter what inquiries may have been made as a preliminary to the legislative act. *Most legislation is preceded by hearings and investigations.* But the effect of the inquiry, and of the decision upon it, is determined by the nature of the act to which the inquiry and decision lead up." [Italics ours.]

In *St. Joseph Stock Yard Co.* v. *United States et al.*, decided April 27, 1936, 298 U. S. 38, Chief Justice Hughes, in delivering the opinion of the Supreme Court, stated at pp. 50-51:

"In view, however, of the discussion in the court's opinion, the preliminary question should be considered. The fixing of rates is a legislative act. In determining the scope of judicial review if that act there is a distinction between action within the sphere of legislative authority and action which transcends the limits of legislative power. Exercising its rate-making authority, the legislature has broad discretion. It may exercise that authority directly or through the agency it creates or appoints to act for that purpose in accordance with appropriate standards. The court does not sit as a board of revision to substitute its judgment for that of the legislature or its agents as to matters within the province of either (*San Diego Land & Town Co.* v. *Jasper*, 189 U. S. 439, 446; *Minnesota Rate Cases*, 230 U. S. 352, 433; *Los Angeles Gas Corporation* v. *Railroad Commission*, 289 U. S. 287, 304). When the legislature itself acts within the broad field of legislative discretion, its determinations are conclusive. When the legislature appoints to act within that sphere of legislative authority, it may endow the agent with power to make findings of fact which are conclusive, provided the requirements of due process which are specially applicable to such an agency are met as in according a fair hearing and acting upon evidence and not arbitrarily (*Interstate Commerce Commission* v. *Louisville & Nashville R. Co.*, 227 U. S. 88, 91; *Virginia Ry. Co.* v. *United States*, 272 U. S. 658, 663; *Tagg Bros. & Moorhead* v. *United States*, supra, p. 444; *Florida* v. *United States*, 292 U. S. 1, 12). In such cases the judicial inquiry into the facts goes no further than to ascertain whether there is evidence to support the findings, and the question of the weight of the evidence in determining issues of fact lies with the legislative agency acting within statutory authority."

The foregoing decisions fully substantiate the proposition that the power which the Interstate Commerce Commission or the United States Maritime Commission exercises in fixing a rate, regulation, etc., to be imposed in the future is legislative in character.

THE MATTERS OF THE REASONABLENESS OF RATES, AND THE PERMISSIBLE DISCRIMINATION BASED UPON DIFFERENCE IN CONDITION, ARE NOT MATTERS OF LAW

In *Pennsylvania R. Co.* v. *International Coal Mining Company* (230 U. S. 184), the court said:

"Under the statute there are many acts of the carriers which are lawful or unlawful according as they are reasonable or unreasonable, just or unjust. The determination of such issues involves a comparison of rate with service, and calls for an exercise of the discretion of the administrative and rate-regulating body. *For the reasonableness of rates, and the permissible discrimination based upon difference in conditions, are not matters of law*, and so far as the determination depends upon facts, no jurisdiction to pass upon the administrative questions involved has been conferred upon the courts. That power has been vested in a single body, so as to secure uniformity and to prevent the varying and sometimes conflicting results that would flow from the different views of the same facts that might be taken by different tribunals." [Italics ours.]

A NONATTORNEY, DEVELOPING FACTS BEFORE THE INTERSTATE COMMERCE COMMISSION OR THE UNITED STATES MARITIME COMMISSION IN MATTERS OF A LEGISLATIVE CHARACTER TO GOVERN FOR THE FUTURE, IS NOT ENGAGED IN THE PRACTICE OF LAW, BUT IS ENGAGED IN THE PRACTICE OF TRANSPORTATION

The Legislature of the United States created the Interstate Commerce Commission and the United States Maritime Commission to assist it in its legislative processes in governing various transactions subject to its authority, as, for example, the rates and practices of carriers; the legislature thus being able to apply its standards to a host of instances which it is impractical to consider and legislate

upon directly and the action being none the less legislative in character because taken through its agent, the Interstate Commerce Commission or the United States Maritime Commission (*Crowell Deputy Commissioners v. Benson*, supra).

A nonattorney developing facts before the Interstate Commerce Commission or the United States Maritime Commission, in matters of a legislative character to govern for the future, is merely helping such commission to assist the legislature in its legislative processes, it being impractical for the legislature to legislate directly upon the multitude of transactions subject to its authority. A nonattorney thus engaged before the Interstate Commerce Commission or the United States Maritime Commission, as agent of the legislature is no more practicing law than if he were developing the same facts directly before the legislature itself; in fact, the Supreme Court of Ohio concedes the correctness of this proposition in *Goodman v. Beall* (130 Ohio State 427), when it says (p. 431) "without entering into an extended discussion, let it be noted that the representation of others before such bodies has been determined many times *not to constitute the practice of law, and they are conceded the power to promulgate* rules governing the *practice* before them." (Italics ours.)

As stated by Chief Justice Hughes (this brief, p. 1):

"the complexities of our modern lives have brought into play rules of conduct which demand for their enforcement new machinery, and it results that a most of controversies as to public and private rights *are not being decided in the courts.* The multiplication of administrative agencies is the outstanding characteristic of our time." (Italics ours.)

IN CONCLUSION

It having been shown that qualified laymen and industrial traffic managers, under the conditions set forth, would not be practicing law but would be practicing transportation, it is submitted that such qualified laymen and industrial traffic managers should not be deprived of the right to practice before the Interstate Commerce Commission and the United States Maritime Commission in matters of a legislative character.

Respectfully submitted.

G. E. MACE,
E. E. WILLIAMSON,
Special Committee.

On behalf of the Shippers' Conference of Greater New York:

R. H. GOEBEL, *Secretary.*
WILLIAM R. SETTOAS, *Chairman.*

STATEMENT OF THE LEGISLATIVE COMMITTEE, PHILADELPHIA PATENT LAW ASSOCIATION

APRIL 7, 1941.

Re S. 918
Senator FREDERICK VAN NUYS,
Chairman, Senate Committee on Judiciary,
United States Senate, Washington, D. C.

DEAR SIR: On behalf of the legislative committee of the Philadelphia Patent Law Association I wish to urge that patent and trade-mark procedure originating in the United States Patent Office be specifically exempted from any general administration bill reported by your committee. There is at present a special and necessarily rather elaborate procedure in patent and trade-mark matters, and it would be unwise to complicate this by superimposing the provisions of a general administration bill.

Please include this recommendation with the reports on your hearings.

Respectfully submitted.

JOSEPH GRAY JACKSON, *Chairman.*

STATEMENT OF THE SOUTH JERSEY PORT COMMISSION

CAMDEN, N. J., *June 3, 1941.*

CHAIRMAN, UNITED STATES SENATE JUDICIARY COMMITTEE,
Capitol Building, Washington, D. C.

DEAR SIR: This letter has reference to the following subjects:
Senate No. 918 (American Bar Association committee bill);
Senate Nos. 674 and 675 (Administrative procedure bills).

Change in status of appearance and/or intervention of commercial traffic managers and/or petitioners.

The South Jersey Port Commission is an agency of the State of New Jersey exercising the authority of the South Jersey Port District, a public corporation and body politic. The port district embraces seven tidewater counties bordering on the Delaware River and Bay. The commission operates the Camden Marine Terminals at Camden, N. J.

This commission is charged by the legislature with "the furtherance of commerce and industries in the district" and is authorized to "intervene in any proceeding affecting the commerce of the district." A traffic bureau is maintained, with experienced traffic men in charge.

One of the duties of the commission is to protect and preserve the integrity of the South Jersey Port District in rate matters. Any legislation which would restrict or tend to restrict our nonlawyer traffic counselors from appearing or intervening, as at present, in proceedings of vital interest to the South Jersey Port District would defeat the attainment of that objective, as set forth in our State statutes (New Jersey Laws of 1926, C. 336; New Jersey Rev. Stats., 12:11-1 to 43.)

This commission strongly opposes any legislation which will change or tend to change the status of appearance and/or intervention of commercial traffic managers and/or practitioners before the Interstate Commerce Commission or other regulatory body or Federal department having jurisdiction over rate matters of common carriers by water, rail, or motortruck.

Very respectfully presented by

SOUTH JERSEY PORT COMMISSION,
UPTON S. JEFFERYS, *Secretary.*

NAMES AND ADDRESSES OF SUBSCRIBERS TO THE STATEMENT SUBMITTED TO THE SENATE JUDICIARY COMMITTEE, BY MILTON P. BAUMAN, ON MAY 22, 1941, CONCERNING SENATE BILLS 674, 675, AND 918

ALABAMA

R. G. Cobb, general manager, traffic department, Mobile Chamber of Commerce, Mobile, Ala.
H. A. Hopkins, secretary-manager, Anniston Traffic Bureau, Anniston, Ala.
C. E. Jones, traffic manager, Southern Kraft Corporation, Mobile, Ala.
H. E. Quarles, assistant general freight agent, Gulf, Mobile & Ohio Railroad Co., Mobile, Ala.
A. J. Ribe, 600-607 Woodward Building, Birmingham, Ala.
A. W. Vogtle, manager, DeBardeleben Coal Corporation, Birmingham, Ala.

ARIZONA

Calvin L. Blaine, 900 Title & Trust Building, Phoenix, Ariz.
Charles E. Blaine, 900 Title & Trust Building, Phoenix, Ariz.

ARKANSAS

Harry Earhart, St. Louis Southwestern Railway Lines, Little Rock, Ark.
L. Carter Johnson, Arkansas Bank & Trust Building, Hope, Ark.

CALIFORNIA

Charles A. Bland, board of harbor commissioners, Long Beach, Calif.
B. F. Bolling, traffic manager, the Flintkote Co., Los Angeles, Calif.
H. R. Brashear, manager, transportation department, Los Angeles Chamber of Commerce, Los Angeles, Calif.
Roy S. Busby, traffic manager, southern California division of General Motors Corporation, South Gate, Calif.
J. B. Costello, general traffic manager, Sperry Flour Co., San Francisco, Calif.
T. G. Differding, California Railroad Co., State Building, San Francisco, Calif.
Howard G. Freas, 212-213 State Building, San Francisco, Calif.
C. A. Hodgman, traffic manager, harbor department, city of San Diego, San Diego, Calif.
A. Larsson, 268 Market Street, San Francisco, Calif.
T. A. L. Loretz, Loretz & Shannon, Board of Trade Building, Los Angeles, Calif.
R. C. Neill, traffic manager, California Fruit Growers Exchange, Los Angeles, Calif.

COLORADO

John R. Halley, district inspector, Western Weighing and Inspection Bureau, 202 Union Station, Denver, Colo.
Monroe P. Hester, 1620 Grant Street, Denver, Colo.
O. E. Nelson, traffic manager, the Denver Alfalfa Milling & Products Co., Lamar, Colo.
D. C. Stone, general manager, Rocky Mountain Motor Tariff Bureau, Inc., 627 Denham Building, Denver, Colo.
G. H. Work, assistant manager, the Colorado Milling & Elevator Co., Denver, Colo.

CONNECTICUT

J. F. Atwater, manager of transportation, the American Hardware Corporation, New Britain, Conn.
Earle C. Doebener, assistant general manager, Eastern Motor Freight Conference, 410 Asylum Street, Hartford, Conn.
N. W. Ford, traffic manager, the Manufacturers Association of Connecticut, Hartford, Conn.
W. H. Pease, traffic manager, Bridgeport Brass Co., Bridgeport, Conn.
W. F. Price, traffic manager, the J. B. Williams Co., Glastonbury, Conn.

DELAWARE

P. F. Guerke, traffic manager, chamber of commerce, Wilmington, Del.

DISTRICT OF COLUMBIA

C. E. Bell, Investment Building, Washington, D. C.
C. M. Carter, Middle Atlantic States Motor Carrier Conference, Inc., Earle Building, Washington, D. C.
T. C. Crouch, Middle Atlantic States Motor Carrier Conference, Inc., Earle Building, Washington, D. C.
F. F. Estes, traffic manager, National Coal Association, Southern Building, Washington, D. C.
T. D. Geoghegan, Transportation Building, Washington, D. C.
E. F. Lacey, executive secretary, National Industrial Traffic League, Munsey Building, Washington, D. C.
Joseph Marks, assitsant freight traffic manager, Southern Railway System, Washington, D. C.
Henry J. Saunders, 644 Transportation Building, Washington, D. C.
D. T. Waring, Middle Atlantic States Motor Carrier Conference, Inc., Earle Building, Washington, D. C.
D. C. Wayne, Middle Atlantic States Motor Carrier Conference, Inc., Earle Building, Washington, D. C.

FLORIDA

Joseph H. Donnell, manager, Tampa Traffic Association, Tampa, Fla.
J. S. Farish, traffic manager, Southern Cypress Manufacturers Association, Jacksonville, Fla.
Thomas E. Grady, Greater Miami Traffic Association, DuPont Building, Miami, Fla.
F. E. Harrison, Jr., traffic manager, Florida Traffic Association, Tallahassee, Fla.
F. C. Hillyer, Jacksonville Traffic Bureau, Bay and Laura Streets, Jacksonville, Fla.
W. M. McGill, traffic manager, Brooks-Scanlon Corporation, Foley, Fla.
G. L. Moore, traffic manager, Eppinger & Russell Co., Jacksonville, Fla.

GEORGIA

C. E. Boland, Post Office Box 869, Columbus, Ga.
G. E. Boulineau, freight-traffic manager, Atlanta & West Point Railroad Co., Atlanta, Ga.
E. C. Green, Macon Freight Bureau, Jaques Building, Macon, Ga.
E. L. Hart, traffic manager, Atlanta Freight Bureau, Chamber of Commerce Building, Atlanta, Ga.
O. D. Kcown, traffic manager, Callaway Mills, La Grange, Ga.
T. K. Kesler, manager, Augusta Traffic Bureau, Herald Building, Augusta, Ga.
Slaughter Linthicum, traffic manager, Southeastern Peanut Association, 725 Trust Co. of Georgia Building, Atlanta, Ga.
T. C. Roberts, director, Macon Freight Bureau, Jaques Building, Macon, Ga.

ILLINOIS

F. P. Campbell, Abbott Laboratories, North Chicago, Ill.
James B. Godfrey, Jr., Chicago, Ill.
Herbert L. Hill, traffic manager, traffic bureau, Moline Association of Commerce, Moline, Ill.
A. J. Kelley, treasurer, D. C. Andrews & Co., 327 South LaSalle Street, Chicago, Ill.
Fred Lockhart, 6040 Winthrop Avenue, Chicago, Ill.
M. L. Pieper, traffic commissioner, Springfield Chamber of Commerce, Springfield, Ill.
R. C. Truitt, assistant traffic commissioner, Springfield Chamber of Commerce, Springfield, Ill.
H. E. Weinberger, secretary, Peoria-Pekin District Shippers Conference, Peoria, Ill.
W. V. Wheat, traffic manager, Peoria Board of Trade, Peoria, Ill.

INDIANA

A. P. Eberlin, secretary-manager, Evansville Chamber of Commerce, Evansville, Ind.
L. Lacroix, manager, traffic department, Evansville Chamber of Commerce, Evansville, Ind.
R. C. Stoelting, traffic manager, Eli Lilly & Co., Indianapolis, Ind.

IOWA

L. R. Acuff, assistant traffic commissioner, traffic bureau, Davenport Chamber of Commerce, Davenport, Iowa.
J. L. Behrens, traffic manager, Muscatine Shippers Association, Muscatine, Iowa.
Arthur J. Coburn, assistant traffic manager, Penick & Ford, Ltd., Cedar Rapids, Iowa.
Walter Condran, assistant commerce counsel of State of Iowa, Des Moines, Iowa.
A. R. Crouch, traffic manager, Pittsburgh Des Moines Steel Co., Des Moines, Iowa.
Carl A. Hansen, manager, traffic bureau, Des Moines Chamber of Commerce, Des Moines, Iowa.
C. E. Kiesele, traffic manager, H. B. Glover Co., Dubuque, Iowa.
J. J. Killean, Clinton Co., Clinton, Iowa.

W. F. Parsons, Iowa State Commerce Commission, Des Moines, Iowa.
E. J. Schlecht, secretary, Clinton Manufacturers and Shippers' Association, Clinton, Iowa.
R. A. Schowalter, traffic manager, the Hubinger Co., Keokuk, Iowa.
Charles Shackell, general traffic manager, Penick & Ford, Ltd., Cedar Rapids, Iowa.
C. R. Smith, secretary-manager, Waterloo & Cedar Falls Traffic Association, Waterloo, Iowa.
R. O. Youngerman, traffic manager, Mason City Brick & Tile Co., Mason City, Iowa.

KANSAS

W. E. Bush, sales department, the Light Grain & Milling Co., Liberal, Kans.
W. M. Dyer, manager, traffic department, the Wichita Chamber of Commerce, Wichita, Kans.
R. E. Fisher, traffic manager, the El Dorado Refining Co., El Dorado, Kans.
H. M. Hancock, traffic manager, Chamber of Commerce, Salina, Kans.
C. O. Heinley, transportation commissioner, Hutchinson Chamber of Commerce, Hutchinson, Kans.
Roy E. Hughes, traffic manager, the New Era Milling Co., Arkansas City, Kans.
E. E. Kohlwes, executive secretary, the Wichita Board of Trade, Wichita, Kans.
C. F. Real, traffic commissioner, Topeka Traffic Association, Topeka, Kans.
George Shuler, Jr., manager of traffic bureau, Kansas Motor Carriers Association, Inc., Topeka, Kans.
Neil L. Toedman, secretary, Independent Truck Owners' League of Kansas, Yates Center, Kans.

KENTUCKY

Frank H. Luther, general traffic manager, Joseph E. Seagram & Sons, Inc., Louisville, Ky.

LOUISIANA

E. B. McKinney, New Orleans Joint Traffic Bureau, New Orleans, La.
C. A. Mitchell, assistant general manager, New Orleans Joint Traffic Bureau, New Orleans, La.
A. G. T. Moore, traffic manager, Southern Pine Association, Interstate Bank Building, New Orleans, La.
E. H. Thornton, general manager, New Orleans Joint Traffic Bureau, Interstate Bank Building, New Orleans, La.

MAINE

A. H. Erlandson, traffic manager, Sanford Mills, Sanford, Maine.
George H. Thompson, Maine State Chamber of Commerce, City Hall, Portland, Maine.

MARYLAND

E. F. Hanlon, traffic manager, Celanese Corporation of America, Cumberland, Md.

MASSACHUSETTS

F. A. Cameron, W. F. Schrafft & Sons Corporation, Boston, Mass.
W. H. Day, manager, transportation bureau, Boston Chamber of Commerce, Boston, Mass.
A. H. Ferguson, manager, bureau of transportation and public service, New Bedford Board of Commerce, New Bedford, Mass.
A. M. Howland, traffic manager, Consolidated Rendering Co., Boston, Mass.
James H. McCann, transportation manager, Associated Industries of Massachusetts, Boston, Mass.
R. A. Potter, traffic manager, New England Confectionery Co., Cambridge, Mass.
Charles E. Vose, traffic manager, Godfrey L. Cabot, Inc., Boston, Mass.

MICHIGAN

C. L. Athanson, secretary, Michigan State Millers Association, Grosse Pointe, Mich.
N. J. Brennan, traffic manager, Chrysler Corporation, Detroit, Mich.
W. R. Coles, traffic manager, Detroit Harbor Terminals, Inc., West Jefferson at foot of Clark Street, Detroit, Mich.
Allen Dean, manager, transportation bureau, Detroit Board of Commerce, Detroit, Mich.
D. M. Droste, traffic manager, Allen Industries, Inc., Detroit, Mich.
C. E. Elerick, traffic commissioner, Grand Rapids Association of Commerce, Grand Rapids, Mich.
N. B. Green, secretary, Detroit Chemical Works, Detroit, Mich.
E. F. McClellan, vice president, Associated Truck Lines, Detroit, Mich.
K. A. Moore, general traffic manager, Automobile Manufacturers Association, New Center Building, Detroit, Mich.
Francis S. Norton, 17565 Warrington Drive, Detroit, Mich.
C. R. Olson, vice chairman, general area committee, Detroit, Mich.
G. H. Ostermann, director of traffic, the Timken-Detroit Axle Co., Detroit, Mich.
L. R. Singler, traffic manager, National Automotive Fibres, Inc., Detroit, Mich.
Francis L. Williams, Michigan Trust Building, Grand Rapids, Mich.

MINNESOTA

H. W. Bishop, Nash-Finch Co., Minneapolis, Minn.
A. R. Fowler, the Associated Motor Carriers Tariff Bureau, St. Paul, Minn.
W. N. Gage, the Associated Motor Carriers Tariff Bureau, St. Paul, Minn.
George E. Hunt, traffic manager, Butler Bros., Minneapolis, Minn.
F. S. Keiser, traffic commissioner, Duluth Chamber of Commerce, Duluth, Minn.
F. H. Kroeger, the Associated Motor Carriers Tariff Bureau, St. Paul, Minn.
Robert L. Landberg, 3832 Standish Avenue, Minneapolis, Minn.
H. Mueller, secretary-general manager, Port Authority of the City of St. Paul, St. Paul, Minn.
O. I. Romfo, traffic manager, Atkinson Milling Co., Minneapolis, Minn.
E. B. Smith, director of traffic, General Mills, Inc., Minneapolis, Minn.

MISSOURI

George T. Atkins, Missouri-Kansas-Texas Lines, St. Louis, Mo.
W. S. Barton, Ash Grove Lime & Portland Cement Co., Kansas City, Mo.
George T. Bidwell, General Freight Service Association, St., Louis, Mo.
R. R. Chavis, Missouri-Kansas-Texas Lines, St. Louis, Mo.
R. E. Clemenson, traffic manager, Union Wire Rope Corporation, Kansas City, Mo.
D. A. Cole, assistant director, traffic bureau, St. Louis Chamber of Commerce, St. Louis, Mo.
D. J. Collins, general freight agent, Missouri-Kansas-Texas Railroad, St. Louis, Mo.
Charles R. Diminitt, Missouri-Kansas-Texas Railroad, St. Louis, Mo.
John P. Ganly, Missouri-Kansas-Texas Railroad, St. Louis, Mo.
J. F. Garvin, vice president, Missouri-Kansas-Texas Railroad, St. Louis, Mo.
Vernon Gaston, assistant general freight agent, Missouri-Kansas-Texas Railroad, St. Louis, Mo.
Carl Giessow, director, traffic bureau, St. Louis Chamber of Commerce, St. Louis, Mo.
H. J. Goudelock, executive secretary, Midwest Coal Traffic Bureau, Kansas City, Mo.
Ernest D. Grinnell, St. Louis, Mo.
A. E. Hanson, 1210 Chemical Building, St. Louis, Mo.
C. P. Hoy, traffic commissioner, Fifth and Ninth Districts Coal Traffic Bureau, St. Louis, Mo.
J. E. Johnston, traffic manager, Southwestern Lumbermen's Association, Kansas City, Mo.
H. F. Klocker, assistant traffic manager, Monsanto Chemical Co., St. Louis, Mo.
Thomas B. Martin, commissioner, traffic department, Chamber of Commerce, Joplin, Mo.

J. Mason, manager, traffic department, W. S. Dickey Clay Manufacturing Co., Kansas City, Mo.
H. L. McReynolds, traffic and distribution manager, Socony-Vacuum Oil Co., White Eagle Division, Kansas City, Mo.
Curtis R. Morrow, Orscheln Bros. Truck Lines, Moberly, Mo.
Jack Nelson, vice president and general manager, Knaus Truck Lines, Inc., Kansas City, Mo.
J. S. Parker, traffic manager, Cowden Manufacturing Co., Kansas City, Mo.
R. H. Parrette, The Larabee Flour Mills Co., Kansas City, Mo.
H. G. Powell, 710 North Twelfth Boulevard, St. Louis, Mo.
W. E. Rosenbaum, Central Illinois District Coal Traffic Bureau, St. Louis, Mo.
J. C. Ryan, Ryan Traffic Service, St. Louis, Mo.
A. T. Sindel, traffic commissioner, Merchants' Exchange of St. Louis, St. Louis, Mo.
B. H. Smith, Thompson Hayward Chemical Co., Kansas City, Mo.
H. R. Smith, assistant general freight agent, Missouri-Kansas-Texas Railroad Co., St. Louis, Mo.
E. L. Spath, Missouri-Kansas-Texas Railroad Co., St. Louis, Mo.
B. A. Springrose, 404 Merchants Exchange, St. Louis, Mo.
W. Raymond Stoble, Railway Exchange Building, St. Louis, Mo.
B. G. Stolte, Missouri-Kansas-Texas Railroad Co., St. Louis, Mo.
R. C. Trovillion, freight traffic manager, Missouri-Kansas-Texas Railroad Co., St. Louis, Mo.
Oscar W. Utz, Missouri-Kansas-Texas Railroad Co., St. Louis, Mo.
A. F. Versen, managing director, Business Men's Association of South St. Louis, St. Louis, Mo.
L. M. Wallace, traffic manager, A. P. Green Fire Brick Co., Mexico, Mo.
W. J. Westerman, vice president and traffic manager, Oyster Shell Products Corporation, St. Louis, Mo.

MONTANA

B. C. Kinman, Union Motor Freight Terminal, Butte, Mont.
L. F. Nichols, traffic manager, Royal Milling Co., Great Falls, Mont.
H. B. Schaefer, board of railroad commissioners, Helena, Mont.

NEBRASKA

R. W. Bagby, Dempster Mill Manufacturing Co., Beatrice, Nebr.
C. E. Childe, Woodmen of the World Building, Omaha, Nebr.
H. C. Stender, traffic manager, Baker Ice Machine Co., Inc., Omaha, Nebr.

NEW HAMPSHIRE

J. J. Cummings, New Hampshire Manufacturers' Association, Manchester, N. H.
W. F. Everding, traffic manager, Brown Co., Berlin, N. H.

NEW JERSEY

E. E. Ebert, 124 Branford Place, Newark, N. J.
Charles F. Hale, traffic manager, Peter J. Schweitzer, Inc., Spotswood, N. J.
W. Hildebrand, vice president, traffic, Thomas A. Edison, Inc., West Orange, N. J.
J. K. Hiltner, traffic manager, United States Pipe & Foundry Co., Burlington, N. J.
E. B. Johnson, I. T. Williams Co., Carteret, N. J.
A. Markowitz, traffic manager, New York & New Brunswick Auto Express Co., Inc., New Brunswick, N. J.

NEW YORK

J. P. Dervin, freight traffic manager, New York Central System, 466 Lexington Avenue, New York, N. Y.
George O. Griffith, general traffic manager, Proprietary Agencies, Inc., Post Office Box 13, Canal Street Station, New York, N. Y.

E. T. Hadley, general traffic manager, the Borden Co., 350 Madison Avenue, New York, N. Y.
C. V. Hanlon, 66 Beverly Road, Wantagh, New York, N. Y.
G. L. Hilliard, commissioner, transportation department, Chamber of Commerce, Jamestown, N. Y.
H. Ignatius, general traffic manager, International Paper Co., 220 East Forty-second Street, New York, N. Y.
F. L. Lenz, assistant general freight agent, Clyde-Mallory Lines, pier 34, North River, New York, N. Y.
G. E. Mace, manager, traffic bureau, the Merchants' Association of New York, Woolworth Building, New York, N. Y.
J. C. Magness, traffic manager, Glass Container Association of America, 19 West Forty-fourth Street, New York, N. Y.
Fred M. Renshaw, traffic commissioner, Buffalo Chamber of Commerce, Buffalo, N. Y.
L. C. Seff, 1209 Ocean Avenue, Brooklyn, N. Y.
E. D. Sheffe, assistant traffic manager, Standard Oil Co. of New Jersey, 26 Broadway, New York, N. Y.
A. C. Welsh, transportation secretary, Brooklyn Chamber of Commerce, 26 Court Street, New York, N. Y.
J. L. Williams, traffic manager, 50 Church Street, New York, N. Y.

NORTH CAROLINA

H. E. Boyd, traffic manager, Wilmington Port-Traffic Association, Wilmington, N. C.
W. S. Creighton, traffic secretary and treasurer, North Carolina Traffic League, Charlotte, N. C.
P. H. Johansen, Cannon Mills Co., Kannapolis, N. C.
A. H. Lathrop, traffic manager, American Enka Corporation, Enka, N. C.
H. M. Nicholson, director of traffic, State of North Carolina Utilities Commission, Raleigh, N. C.

NORTH DAKOTA

John M. Agrey, Public Service Commission, Bismarck, N. Dak.
T. A. Durrant, traffic manager, Grand Forks Civic and Commerce Association, Grand Forks, N. Dak.
Ernest J. Hanson, Public Service Commission, Bismarck, N. Dak.

OHIO

C. J. Beckstedt, traffic manager, the Williamson Heater Co., Cincinnati, Ohio.
R. A. Ellison, Service Bureau Co., Neave Building, Cincinnati, Ohio.
E. J. Eling, traffic manager, the General Match Co., Cincinnati, Ohio.
J. J. McGuinn, president, the Cincinnati Traffic Club, Cincinnati, Ohio.
George R. Hughes, traffic manager, the Lunkenheimer Co., Cincinnati, Ohio.
James V. McMahon, manager, traffic bureau, the Youngstown Chamber of Commerce, Youngstown, Ohio.
H. T. Ratliff, general traffic manager, the Champion Paper & Fibre Co., Hamilton, Ohio.
E. B. Walker, traffic manager, the Globe-Wernicke Co., Cincinnati, Ohio.

OKLAHOMA

E. C. Kitching, general traffic manager, Phillips Petroleum Co., Bartlesville, Okla.
C. R. Musgrave, president, the Associated Traffic Clubs of America, Bartlesville, Okla.

OREGON

Ralph L. Shepherd, secretary-manager, Portland Traffic Association, Spalding Building, Portland Oreg.

PENNSYLVANIA

A. H. Andrews, executive vice president, Greater New Castle Association, Inc., New Castle, Pa.
J. C. Beck, assistant general traffic manager, Gulf Oil Corporation, Pittsburgh, Pa.
Charles Donley, Dravo Building, Pittsburgh, Pa.
D. O. Moore, manager, freight traffic division, the Chamber of Commerce of Pittsburgh, Pittsburgh, Pa.

SOUTH DAKOTA

D. L. Kelley, Public Utilities Commission, Pierre, S. Dak.
R. B. Willard, traffic manager, Commerce Association of Aberdeen, Aberdeen, S. Dak.

TENNESSEE

T. M. Henderson, executive secretary, the Southern Traffic League, Nashville, Tenn.
M. C. Lysle, commissioner, Memphis Freight Bureau, Memphis, Tenn.
C. R. Moffett, traffic manager, 1404 General Building, Knoxville, Tenn.

TEXAS

Harvey Allen, assistant freight traffic manager, Missouri-Kansas-Texas Railroad Co., Dallas, Tex.
E. P. Byars, traffic manager, Fort Worth Freight Bureau, Fort Worth Chamber of Commerce, Fort Worth, Tex.
S. D. Sparkes, freight traffic manager, Missouri-Kansas-Texas Railroad Co., Dallas, Tex.

UTAH

J. D. Campbell, Utah Oil Refining Co., Salt Lake City, Utah.

VIRGINIA

G. H. Alfriend, traffic manager, Virginia-Carolina Chemical Corporation, Richmond, Va.
J. E. Bulluck, traffic manager, Standard Paper Manufacturing Co., Richmond, Va.
W. G. Burnette, traffic manager, traffic bureau, Chamber of Commerce, Lynchburg, Va.
J. B. Jones, traffic manager, Chamber of Commerce, Danville, Va.
J. T. Preston, Mountain Trust Bank Building, Roanoke, Va.
H. V. C. Wade, traffic manager, Richmond Chamber of Commerce, Richmond, Va.

WEST VIRGINIA

S. C. Higgins, traffic manager, New River Coal Operators' Association, Mount Hope, W. Va.

WISCONSIN

O. H. Brown, 219 North Main Street, Waupaca, Wis.
W. E. Buchelt, traffic manager, West Bend Aluminum Co., West Bend, Wis.
E. W. Dallman, traffic manager, Blatz Brewing Co., Milwaukee, Wis.
J. E. Edell, general manager, Service Transfer & Storage Co., La Crosse, Wis.
S. L. Foote, Madison Traffic Bureau, Madison, Wis.
R. J. Laubenstein, traffic commissioner, Green Bay Association of Commerce, Green Bay, Wis.
L. E. Luth, Winona-La Crosse Joint Traffic Bureau, La Crosse, Wis.
John F. McGrath, Gateway City Transfer Co., La Crosse, Wis.
John F. McGrath, Gateway City Transfer Co., La Crosse, Wis.
A. E. Schlicke, traffic manager, Globe Steel Tubes Co., Milwaukee, Wis.
L. H. Zimmerman, traffic manager, Malleable Iron Range Co., Beaver Dam, Wis.

RESOLUTION OF THE PLATTE COUNTY BAR ASSOCIATION, COLUMBUS, NEBR.

UNITED STATES SENATE,
Washington, D. C., August 21, 1941.

The Honorable CARL A. HATCH,
United States Senate.

MY DEAR MR. HATCH: At the request of Mr. C. J. Garlow, president of the Platte County Bar Association, of Columbus, Nebr., I am enclosing a copy of a resolution adopted by that body on August 16 and a copy of a resolution addressed to Mr. Garlow, all with reference to S. 674, S. 675, and S. 918, which are now pending before a subcommittee of the Senate Judiciary Committee, of which you are chairman.

Respectfully yours,

GEORGE W. NORRIS,
United States Senator.

AUGUST 14, 1941.

Hon. C. J. GARLOW,
President Platte County Bar Association, Columbus, Nebr.

MR. PRESIDENT: Your committee on S. 674, S. 675, S. 918, and H. R. 3464 respectfully, makes this report.

The object of each of the above bills is the same. Their object is to prescribe fair standards of duty and procedure of administrative officers and agencies and to establish an administrative code.

Apparently, persons who practice before the different commissions created by Congress feel that they were not fairly treated or perhaps unjustly delayed in getting action. Agitation arose which resulted in the preparation of a bill that would better protect the interests of those coming before such commissions. As a result, different groups undertook the preparation of a bill. S. 675 was prepared by the Attorney General's committee. S. 674 was the minority bill of that committee. S. 918 is the bill prepared by a special committee of the American Bar Association. H. R. 3464 is a companion bill of S. 918.

Your committee devoted sufficient time to the study of these bills to convince themselves that it would require not only a thorough study of each of the provisions in each bill and a thorough comparison of the language and study of the effect of the language but almost unlimited conferences with experts and men experienced in the work of the different commissions created by Congress in order to bring you a report of specific recommendation of any of the proposed bills that we would ask you to adopt.

Your committee finds that a bill for more uniform settlement of disputes coming before the several commissions created by the laws of the United States with adequate provision for opportunity for hearing and for separation prosecuting and adjudicating agencies is needed; that the subcommittee of the Committee on the Judiciary of the United States Senate has made and is making a thorough study of these bills; that the various commissions have wholeheartedly cooperated with the subcommittee; that the office of the Attorney General of the United States and the American Bar Association rendered valuable assistance toward working out a just bill; that we have full confidence that Congress will enact a bill that will greatly improve the procedure as now conducted by the various commissions; that after careful study of these several bills and the various comments by those who appeared before the subcommitee, we find S. 675 is preferable to the other bills and suggest that if action by the Platte County Bar Association is taken, that it recommend S. 675, conditioned, however, that changes be made therein to eliminate or modify the objectionable parts pointed out by those that appeared before the subcommittee of the Committee on the Judiciary, of the United States Senate.

Respectfully submitted.

AUGUST WAGNER,
I. R. SHIELDS,
LOWELL L. WALKER,
R. D. FLORY.

I hereby certify that the foregoing is a true and correct copy of a report addressed to C. J. Garlow, president of the Platte County Bar Association, of

Platte County, Nebr., presented with a resolution by the gentlemen whose names are thereto assigned and filed in our records this 16th day of August 1941.

MARVIN SCHMIDT, *Secretary.*
CHARLES H. SHELDON, *Acting.*

RESOLUTION

Whereas a number of proposed bills are pending before the Congress of the United States to prescribe various standards of duty and procedure of administrative officers, agencies and commissions of the Government, including S. 675, proposed by the Attorney General's committee, S. 674, proposed by a minority of the Attorney General's committee and S. 918 and H. R. 3464, proposed by the Special Committee on Administrative Law of the American Bar Association; and

Whereas there is a serious need for a bill providing for a more uniform settlement of controversies coming before the various commissions created by the laws of the United States, with adequate provision for opportunity for hearing and for separation of the prosecuting and adjudicating agencies of such commissions: Now, therefore, be it

Resolved by the Platte County Bar Association, of Platte County, Nebr., 1. That we commend the fundamental purposes underlying these bills of providing so far as possible for uniformity of the practice and procedure of the various administrative agencies and commissions in settlement of controversies coming before them for determination, with adequate provision for opportunity for hearing by those to be affected by such determinations, and for separation of the prosecuting and adjudicating agencies of such commissions as essential to fair and impartial determination of such controversies.

2. That in the light of the hearings upon the various bills conducted by the committee on judiciary of the United States Senate, it would appear advisable to eliminate from the operation of such a general act such of the administrative agencies and commissions primarily concerned with essential details of the preparedness program and with matters pertaining to international affairs, including the property and rights of foreign countries and subjects thereof, or to modify the application of such act with respect to such agencies and commissions so as to avoid impairing their agencies in dealing with such matters during the present emergency.

3. That S. 675 so modified and modified in such other respects as may be found necessary to meet objections which such hearings have developed or further hearings may develop, would in the opinion of this association best serve the purpose.

4. That copies of this resolution be furnished to United States Senator George W. Norris, United States Senator Hugh Butler, and the Nebraska State Bar Association.

Your committee recommends the adoption of the foregoing resolution.

AUGUST WAGNER, *Chairman.*
LOWELL L. WALKER,
I. R. SHIELDS.

I hereby certify that the foregoing is a copy of a resolution unanimously adopted by the Platte County Bar Association August 16, 1941.

_____,
Secretary of Platte County Bar Association.
CHARLES H. SHELDON, *Acting.*

CONSOLIDATED INDEX OF PERSONS TESTIFYING AND SUBMITTING STATEMENTS AT ADMINISTRATIVE PROCEDURE HEARINGS AS CONTAINED IN PARTS 1–4

CONSOLIDATED INDEX OF PERSONS TESTIFYING AND SUBMITTING STATEMENTS AT ADMINISTRATIVE PROCEDURE HEARINGS AS CONTAINED IN PARTS 1-4—Continued

CONSOLIDATED INDEX OF PERSONS TESTIFYING AND SUBMITTING STATEMENTS AT ADMINISTRATIVE PROCEDURE HEARINGS AS CONTAINED IN PARTS 1-4—Continued

CONSOLIDATED INDEX OF PERSONS TESTIFYING AND SUBMITTING STATEMENTS AT ADMINISTRATIVE PROCEDURE HEARINGS AS CONTAINED IN PARTS 1-4—Continued

GOVERNMENTAL DEPARTMENTS, PRIVATE ORGANIZATIONS, ASSOCIATIONS AND GROUPS REPRESENTED BY TESTIMONY AND SUBMITTED STATEMENTS IN PARTS 1-4

GOVERNMENTAL DEPARTMENTS, PRIVATE ORGANIZATIONS, ASSOCIATIONS AND GROUPS REPRESENTED BY TESTIMONY AND SUBMITTED STATEMENTS IN PARTS 1–4—Continued